Buffalo Law Review

Volume 29 | Number 3 Article 3

7-1-1980

The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts

Stephan Landsman
Cleveland-Marshall College of Law

THE DECLINE OF THE ADVERSARY SYSTEM: HOW THE RHETORIC OF SWIFT AND CERTAIN JUSTICE HAS AFFECTED ADJUDICATION IN AMERICAN COURTS

STEPHAN LANDSMAN*

INTRODUCTION

For several hundred years American courts have utilized an adversary process to adjudicate contested matters. At the heart of this process is a trial in which the litigants present all the evidence they believe to be relevant to the resolution of the dispute. When the trial is concluded a neutral decision maker determines the outcome of the case on the basis of evidence presented. Although elaborate sets of procedural, evidentiary, and ethical rules regulate the behavior of the litigants, the parties retain extensive control over the cases they bring.

In recent years, courts have reduced their reliance on adversary methods. A factor contributing to this result is the conviction shared by a growing number of judges and legal scholars that the adversary method causes delay[1] and is unworkable in an era of overcrowded dockets. Dean Roscoe Pound, in his celebrated 1906 address *The Causes of Popular Dissatisfaction with the Administration of Justice*,[2] originated the rhetoric upon which much of the modern assault on the adversary process has been based. In his address Pound decried the absence of justice both "swift and cer-

---

* Associate Professor, Cleveland-Marshall College of Law. A.B. 1969, Kenyon College, J.D. 1972, Harvard Law School. The author wishes to acknowledge the financial assistance of the Cleveland-Marshall Fund and the intellectual support and aid of a number of colleagues and friends including Richard Kuhns, Robert Bogomolny and Lewis Jordan as well as the research assistance of James Deese and David Moser.

1. For the purposes of this Article no elaborate definition of delay is necessary. As Professors Zeisel, Kalven, and Buchholz have stated "[e]veryone has a rough common sense notion of what court delay means and everyone realizes that delay results from a backlog of pending suits which forces the litigants to stand in line and wait their turn." H. ZEISEL, H. KALVEN, JR. & B. BUCHHOLZ, DELAY IN THE COURT 43 (1959) [hereinafter cited as DELAY IN THE COURT]. It should be noted, however, that the measurement of delay is not a simple or straightforward task. *Id.* at 43-57.

2. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 35 F.R.D. 273 (1964) (previously published in 40 AM. L. REV. 729 (1906)).

tain" in the courts of his day and argued that delay was a major cause of popular dissatisfaction with the judicial process.[3] He condemned a "sporting theory of justice" which rendered judges passive "umpires,"[4] and he roundly criticized a number of adversary mechanisms, including jury trials and strict appellate court enforcement of rules of procedure.[5]

Pound's remarks have served as a manifesto for those championing judicial efficiency and celerity.[6] Their goal has been to secure the adoption of what they deem to be the speediest methods of resolving disputes. In pursuit of this goal the architects of change have ignored the aims and values of those aspects of the adversary process they seek to alter. They have substituted the rhetoric of swift and certain justice for a reasoned assessment of the impact of change on the court system and society.

The adversary process has a number of indispensable components. These include a factfinder who is both neutral and passive, parties who are responsible for the development of the evidence, professional advocates who prepare and prosecute most lawsuits, rules which tightly regulate the conduct of the participants, and appellate courts which oversee the integrity of the process. In Part I of this Article these components and their interrelationships are considered. Part II carries this consideration a step further and concludes that a process with the enumerated adversarial attributes is intrinsically and purposefully slow moving.

Part III details a number of situations in which adversary procedure has been either abandoned or altered because it is said to cause delay or function inefficiently. On the basis of such arguments pressure has been applied to persuade the vast majority of litigants to settle rather than pursue their claims. For similar reasons, decision maker neutrality and passivity have been substantially reduced through encouragement of judicial management of litigation and curtailment of the use of twelve member juries. Alteration of various rules of procedure and evidence has also been

---

3. 35 F.R.D. at 291.

4. *Id.* at 281.

5. *Id. passim.*

6. *See, e.g., Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice,* 70 F.R.D. 79-246 (1976); Burger, *The Courts on Trial: A Call for Action Against Delay,* 44 A.B.A.J. 738 (1958) [hereinafter cited as *A Call for Action*]; Rosenberg, *Let's Everybody Litigate?,* 50 TEX. L. REV. 1349 (1972).

premised upon arguments concerning speed and efficiency. Finally, the availability of appellate review has been curtailed in response to claims that appeals cause unwarranted delay. Most of these changes have been made without meaningful exploration of their impact on the adversary process or the principles that it vindicates.

Yielding to the call for swift and certain justice without carefully scrutinizing the implications of change has undermined a number of procedures important to the adversary process. It has also called into question the continuing viability of the process as a whole. Every element of adversary procedure is designed to slow the pace of litigation. Recognizing delay as a concern so significant that it obviates the need to consider adversary values, suggests that those values are of little lasting importance and that the process can be replaced. Part IV suggests that before change is made the values served by the adversary process must be carefully weighed.

Part V attempts to identify a number of the values served by the adversary process and to fashion a defense of the process in terms of those values. Central to this defense is the proposition that adversary methods are particularly well suited to the protection of individual rights. In an era otherwise dominated by bureaucracy and actions designed to serve the common good, the vindication of individual rights is of extreme importance to society and justifies the preservation of the adversary process.

The final part of this Article attempts to delineate circumstances in which the use of adversary methods may not be appropriate. This section concludes that, with certain exceptions, the wisest approach to the problem is to allow litigants to choose the type of process they think best suited to their particular needs.

I. The Concept of Adversarial Adjudication in American Courts

While there is frequent reference in legal literature to the notion that American courts utilize an adversarial method of adjudication, there has been little scholarly analysis of the nature and implications of the adversary process.[7] Most commentary has fo-

7. Extended discussion of the adversary process is rare in recent American legal literature. The following sources are among the few which devote more than cursory attention to

cused upon one or another technique and designated it the *sine qua non* of adversary process. Cross-examination, party examination of witnesses, and judicial neutrality have each been described in this way.[8] The adversary process, however, should not be viewed as a single technique or collection of techniques; it is a unified concept that works by use of a number of interconnecting procedures, each of real importance to the process as a whole. The central precept of adversary process is that out of the sharp clash of proofs presented by adversaries in a forensic setting, is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.[9] This formulation is advantageous not only because it expresses the overarching adversarial concept, but also because it identifies the method to be utilized in adjudication (the sharp clash of proofs), the actors essential to the process (two adversaries and a decision maker),[10] the nature of their functions (presentation of proofs and adjudication of disputes respectively), and the goal of the entire endeavor (the resolution of disputes in a manner acceptable to the parties and society).

The adversary system utilizes a neutral decision maker who

---

the topic. *See* J. FRANK, COURTS ON TRIAL (1949); W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM (1968) [hereinafter cited as PRETRIAL DISCOVERY]; J. THIBAUT & L. WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975) [hereinafter cited as PROCEDURAL JUSTICE]; Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW (H. Berman ed. 1971); Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516 (1976) [hereinafter cited as *Toward Public Justice*]; Millar, *The Formative Principles of Civil Procedure—I*, 18 ILL. L. REV. 1 (1923); Neef & Nagel, *The Adversary Nature of the American Legal System from a Historical Perspective*, 20 N.Y.L.F. 123 (1974) [hereinafter cited as *Historical Perspective*]; Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1 (1978) [hereinafter cited as *The Unnecessarily Expanding Role*].

8. *See, e.g.*, J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM 127 (1969) (cross-examination); Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1090-91 (1975) (party examination of witnesses); Goodhart, *A Changing Approach to the Law of Evidence*, 51 VA. L. REV. 759, 764 (1965) (neutrality of the judge); *Historical Perspective*, *supra* note 7, at 123-24 (confrontation of witnesses).

9. *See* B. BOTEIN & M. GORDON, THE TRIAL OF THE FUTURE: CHALLENGE TO THE LAW 78 (1963) [hereinafter cited as THE TRIAL OF THE FUTURE]; PRETRIAL DISCOVERY, *supra* note 7, at 13-14; PROCEDURAL JUSTICE, *supra* note 7, at 119; Adams, *The Small Claims Court and the Adversary: Process More Problems of Function and Form*, 51 CAN. BAR REV. 583, 593 (1973) [hereinafter cited as *Small Claims Court*].

10. For purposes of clarity and simplicity all discussions concerning the various aspects of the adjudicatory process will be couched in terms of the confrontation between a single plaintiff and defendant.

adjudicates disputes *after* they have been aired by the adversaries in a contested proceeding. This decision maker is expected to suspend judgment until the conclusion of the contest. To insure this goal is achieved, the trier is enjoined from becoming too active a participant in the proceedings.[11] Adversary theory suggests that if he diverges from passivity[12] by attempting to develop the evidence at trial[13] or to arrange the compromise of the case,[14] he runs a serious risk of undermining his ability to evaluate neutrally the adversaries' presentations.[15]

Adversary theory further suggests that neutrality and passivity are essential, not only to decide individual cases, but also to convince society at large that the court system is trustworthy.[16] When a judge becomes an active inquirer, he may appear to be an advocate rather than a neutral arbiter.[17] Judicial passivity helps to

---

11. The expectation that factfinders will be passive as well as neutral has frequently been identified as a fundamental facet of the American adversary scheme. *See* C. CURTIS, ITS YOUR LAW 1, 1 (1954); PRETRIAL DISCOVERY, *supra* note 7, at 3; PROCEDURAL JUSTICE, *supra* note 7, at 22-23; Goodhart, *supra* note 8, at 764-65; Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160-61 (1958) [hereinafter cited as *Report of the Joint Conference*]; Millar, *supra* note 7, at 16-19; Pound, *supra* note 2, at 281; *The Unnecessarily Expanding Role*, *supra* note 7, at 13. However, certain commentators have argued that the requirement of judicial passivity is a historical accident related to the enmity of the 18th and 19th century electorate for the judiciary. *See, e.g.*, 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2551 (Chadbourn rev. 1970); Connolly, *The Adversary System — Is It Any Longer Appropriate?* 49 AUST. L. REV. 439, 441 (1975); *see also* Scott, *Trial By Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 677-78 (1918).

12. In this Article the term "passivity" is used to signify a considerable degree of judicial deference to the parties in the proof presenting process. However, it is not meant to connote complete judicial quiescence or the inactivity of a "well-behaved child, [who] speaks only when spoken to." Fuller, *supra* note 7, at 45.

13. Active inquiry at trial has frequently been identified as a threat to factfinder neutrality. *See, e.g.*, PRETRIAL DISCOVERY, *supra* note 7, at 4; Adams, *Towards a Mobilization of the Adversary Process*, 12 OSGOODE HALL L.J. 569, 577 (1974) [hereinafter cited as *Mobilization*]; *Report of the Joint Conference*, *supra* note 11, at 1161; Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972) [hereinafter cited as *Legal Decisionmaking*].

14. *See, e.g.*, Flanders, *Case Management in Federal Courts: Some Controversies and Some Results*, 4 JUST. SYS. J. 147, 161 (1978); *Legal Decisionmaking*, *supra* note 13, at 389 n.9.

15. As a general matter it has been said that the more active the judge becomes the greater is the risk that he will abandon a neutral posture in the litigation. *See* notes 13 and 14 *supra;* Fuller, *supra* note 7, at 43-44; Damaska, *supra* note 8 at 1092.

16. *See* PRETRIAL DISCOVERY, *supra* note 7, at 5; PROCEDURAL JUSTICE, *supra* note 7, at 68.

17. *See* note 16 *supra;* Connolly, *supra* note 11; *Mobilization*, *supra* note 13, at 580.

maintain the appearance of fairness which is as vital in the social context as is fairness itself.[18]

The adjudicatory process is generally used to satisfy two objectives: first, the search for material truth, and second, the resolution of disputes between contending parties. While most judicial systems seek to accomplish both these goals, the procedural mechanisms best suited to the achievement of each are different. The choice of a given set of procedural mechanisms will, perforce, favor one or the other goal.[19] Where judges are assigned an active, inquisitorial part in the litigation process they will most often be expected to undertake an uninhibited quest for material truth. Perhaps the best examples of this approach are the justice systems of the Eastern European Socialist States.[20] However, when judges are assigned a neutral and passive function they will, in all likelihood, be expected to devote their energies to the resolution of the disputes framed by the litigants. The American adversary system has traditionally accepted the latter approach and thereby favored the goal of resolving disputes rather than searching for material truth.[21]

---

18. *See* notes 16 and 17 *supra; see also* Commonwealth Coatings Corp. v. Continental Gas Co., 393 U.S. 145 (1968); Offut v. United States, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice"); *see also,* Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172 n.19 (Frankfurter, J., concurring).

Throughout this Article reference will be made to a number of federal court opinions and rules. While such opinions and rules do not necessarily reflect the condition of the adversary process in every jurisdiction in the United States, they have been selected because they illustrate significant trends in American jurisprudence.

19. *See* M. CAPPELLETTI & J. JOLOWICZ, PUBLIC INTEREST PARTIES AND THE ACTIVE ROLE OF THE JUDGE IN CIVIL LITIGATION 244-77 (1975) [hereinafter cited as THE ACTIVE ROLE OF THE JUDGE]; *see also* Millar, *supra* note 7.

20. *See* THE ACTIVE ROLE OF THE JUDGE, *supra* note 19, at 174-77. In Poland for instance:

> The principle of material truth is placed at the forefront of the principles of civil procedure, which means of necessity that the court cannot limit itself strictly to the evidence produced by the parties, even though they are themselves placed under a positive duty to make the circumstances of the case clear in accordance with the truth and without concealing any fact; the court even exercises a control over admissions, discontinuances and voluntary settlements, at least to the extent that it is not obliged to accept the act of the party as final but can examine it to see if, for example, it is in conformity with the law.

Id. at 176.

21. PRETRIAL DISCOVERY, *supra* note 7, at 13-14; H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 366-68 (unpublished manuscript 1958) [hereinafter cited as THE LEGAL PROCESS]; THE TRIAL OF THE FUTURE, *supra* note 9, at 78; Rifkind, *Are We Asking Too Much of Our Courts?,* 15 JUDGES' J. 43, 46 (1976);

While either a judge or jury may serve as trier in most kinds of cases heard in American courts, the decision maker preferred in adversary doctrine is the jury. The judge is deeply enmeshed in the pretrial and trial process. He is the supervisor of discovery, the adjudicator of motions, the enforcer of the rules of evidence, and the declarer of law. His passivity and neutrality will doubtless be strained as he performs these functions.[22] It is to the jury's advantage, at least in the adversary context, that it does not face similar strains, and it will seldom be prematurely drawn into the contest.[23] A second advantage of the jury is that its members are likely to be free of those predispositions a judge develops because of his training and daily experience in handling legal matters.[24] Further, because the jury comprises a number of individuals, the prejudices of any single juror will not usually destroy the capacity of the jury to fulfill the adjudicatory function in a neutral manner.[25] This is to be

---

The Unnecessarily Expanding Role, supra note 7, at 11-12.

A number of American judges and scholars have criticized the adversary method and its bias in favor of resolving disputes rather than searching for material truth. *See, e.g.,* J. FRANK, *supra* note 7; Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation,* 70 F.R.D. 83 (1976); Frankel, *The Search for Truth: An Umpireal View,* 123 U. PA. L. REV. 1031 (1975) [hereinafter cited as *The Search for Truth*]; Pound, *supra* note 2.

Several arguments may be made in defense of the adversarial commitment to dispute resolution. First, the vagaries of human memory and expression will often render the discovery of material truth impossible. Under such circumstances the commitment of the judicial process to the search for truth may be considered both naive and futile. *See, e.g.,* A. EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE 280-81 (1971); Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea,* 123 U. PA. L. REV. 1067, 1076-79 (1975). Second, commitment to an uninhibited search for material truth can foster a willingness to disregard personal dignity and privacy for the sake of uncovering all the facts. Adversarial emphasis on dispute resolution lessens the risk of this sort of abuse. *See* D. LOUISELL & H. WILLIAMS, THE PARENCHYMA OF LAW 412-13 (1960) [hereinafter cited as THE PARENCHYMA OF LAW]; THE TRIAL OF THE FUTURE, *supra* note 9, at 46-47; Freedman, *Judge Frankel's Search for Truth,* 123 U. PA. L. REV. 1060, 1065 (1975); Kaplan, *Of Mabrus and Zorgs,* 66 CAL. L. REV. 987, 990 (1978).

22. *See, e.g.,* Frankel, *The Adversary Judge,* 54 TEX. L. REV. 465 (1976).

23. Members of the jury are only likely to be drawn into the contest in those few cases in which extensive pretrial publicity causes irremediable prejudice against one of the parties. *See, e.g.,* Sheppard v. Maxwell, 384 U.S. 333 (1963).

24. *See* C. CURTIS, *supra* note 11, at 97-98; C. JOINER, CIVIL JUSTICE AND THE JURY 34-35 (1962); H. KALVEN & H. ZEISEL, THE AMERICAN JURY 7-10 (1966) [hereinafter cited as THE AMERICAN JURY]; THE TRIAL OF THE FUTURE, *supra* note 9, at 112-13; *The Unnecessarily Expanding Role, supra* note 7, at 20. *But see* note 28 *infra.*

25. Twelve person juries have generally been credited with the ability to overcome the prejudices of individual jurors. *See, e.g.,* THE AMERICAN JURY, *supra* note 24, at 20; THE PARENCHYMA OF LAW, *supra* note 21, at 57-58 citing Railroad Company v. Stout, 17 Wall 657, 664 (1873); THE TRIAL OF THE FUTURE, *supra* note 9, at 111. With respect to juries of

contrasted with the situation of the solitary judge whose biases frequently influence the decisions he renders.[26] Finally, through voir dire and peremptory challenge, jurors with manifest or latent biases can be removed from the decision making panel, thereby augmenting the likelihood of neutral adjudication. There is no adequate mechanism to insure judicial neutrality.[27] For all these reasons the jury is more likely than the judge to meet adversarial expectations and remain neutral and passive until the end of the contest.[28]

A procedural principle of the American adversary system inti-

---

less than twelve but more than five there has been lively debate concerning the ability to control juror bias. For materials promoting juries of less than twelve, *see* Williams v. Florida, 399 U.S. 78 (1970); Colgrove v. Battin, 413 U.S. 149 (1973) and sources cited therein. For materials critical of the capabilities of juries of less than twelve, *see, e.g.*, Lempert, *Uncovering 'Nondiscernable' Differences: Empirical Research and the Jury—Size Cases*, 73 MICH. L. REV. 644 (1975); Zeisel, *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1971) [hereinafter cited as *And Then There Were None*]; *see also* Ballew v. Georgia, 435 U.S. 223 (1978) and materials cited therein especially at n.10. With respect to juries of five or fewer there is general agreement that the risk of prejudicial influence substantially increases. *See* Ballew v. Georgia, *supra*.

26. Even a significant number of judges view juries as more likely than judges to be neutral decision makers. *See* Powell, *Jury Trial of Crimes*, 23 WASH. & LEE L. REV. 1, 9-10 (1966); Note, *With Love in Their Hearts but Reform on Their Minds: How Trial Judges View the Civil Jury*, 4 COLUM. J.L. & SOC. PROB. 178, 185 (1968) [hereinafter cited as *Reform on Their Minds*] (twenty-nine percent of judges queried indicated that "juries are more often 'neutral' than judges who often have fixed views"). This view is apparently shared by a significant number of the litigants who opt for jury trial. *See* ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, THE AMERICAN JURY SYSTEM—FINAL REPORT 18 (1977) [hereinafter cited as FINAL REPORT]; DELAY IN THE COURT, *supra* note 1, at 92; *The Unnecessarily Expanding Role, supra* note 7, at 36.

27. A number of states do have what amounts to a peremptory challenge system for the removal of judges. *See* Project, *Disqualification of Judges for Prejudice or Bias—Common Law Evolution, Current Status, and the Oregon Experience*, 48 ORE. L. REV. 311, 347 (1969); Note, *Caesar's Wife Revisited—Judicial Disqualification After the 1974 Amendments*, 34 WASH. & LEE L. REV. 1201, 1217-18 (1977). However, it is generally agreed that in the federal system and in most states recusal and disqualification mechanisms are woefully inadequate to resolve problems of judicial bias and hostility. *See, e.g., The Unnecessarily Expanding Role, supra* note 7, at 43; Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236 (1978); Comment, *Disqualifying Federal District Judges Without Cause*, 50 WASH. L. REV. 109 (1974).

28. The general theoretical superiority of the jury does not mean that juries will always be the best possible factfinders. The racial, ethnic, or social composition of a jury may have an overwhelming impact on factfinding in a particular case. *See, e.g.*, D. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969) (detailed study of the plight of the nine young blacks accused of raping two white women in Alabama in 1932—white juries displayed irremediable racial bias throughout the judicial proceedings held in the case); *Contrast* Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 502-04 (1975).

mately connected with the requirements of decision making passivity and neutrality, is that the parties are responsible for the development of all the evidence upon which the decision will be based.[29] This principle insulates the trier from involvement in the contest. It also encourages the adversaries to find the most persuasive evidence and present it to the decision maker.[30] By placing the evidentiary burden on the parties, the trier has the added advantage of seeing what each side believes to be its most persuasive and consequential proof. The choices made by the parties help focus the litigation upon the issues of greatest importance to them and facilitate decisions tailored to their needs.[31]

The American adversary system relies on a class of skilled professional advocates to assemble and present testimony upon which decisions will be based. The advocates are expected to provide the forensic talents necessary to organize the evidence and formulate the issues; their job is to insure a sharp adversarial contest.[32] If

---

29. *See* THE ACTIVE ROLE OF THE JUDGE, *supra* note 19, at 247-48; PROCEDURAL JUSTICE, *supra* note 7:

> In the adversary model each party to the dispute is usually represented by an openly biased advocate who is charged with exercising his party's control while seeking to establish the validity of his or her contentions. The roles of adversarial attorneys are therefore somewhat anomalous: overtly they act in contentious support of conflicting claims, yet they constitute a tacit coalition to maintain a high degree of disputant control over the process.

Id. at 23; Damaska, *supra* note 8, at 1090-91; Millar, *supra* note 7, at 16-18; *Mobilization, supra* note 13, at 576.

30. *See* PROCEDURAL JUSTICE, *supra* note 7, at 28-40 (experimental finding that attorneys in adversary setting "sought more information" than attorneys in inquisitorial setting "when the distribution of fact [was] unfavorable"); Freedman, *Professional Responsibilities of the Civil Practitioner*, in EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER, 152 (D. Weckstein ed. 1970); *Report of the Joint Conference, supra* note 11, at 1160-61.

In response to this proposition critics have claimed that the parties will find and utilize the evidence best suited to their arguments but will not look for or disclose the evidence most likely to reveal material truth. *See, e.g.*, J. FRANK, *supra* note 7, at 80-85.

31. The benefit of such a focus is measurable in economic terms. Professors Lea and Walker suggest that where an "autocratic," judge dominated procedure is used to resolve disputes a court will often reach decisions not well fitted to the needs of the litigants. Such decisions significantly increased the "impositional costs" (*i.e.*, costs attributable to an unbargained for and poorly tailored resolution of a problem) of adjudication. Such costs can in large measure be avoided in a system that relies on participant direction and control. Lea & Walker, *Efficient Procedure*, 57 N. CAR. L. REV. 361, 376 (1979) [hereinafter cited as *Efficient Procedure*].

32. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 31-33 (1972); Gideon v. Wainright, 372 U.S. 335, 344 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932); PRETRIAL DISCOVERY *supra* note 7, at 15.

advocates fail to carry out their duty, development of the case will falter and the adversary process will be undermined. Such failure also increases the likelihood that judges, either because of their desire to discover material truth or to insure balanced presentations, will assume responsibility for the development of cases.[33] This in turn may threaten a judge's neutrality and the accuracy of the decision rendered.[34]

Elaborate sets of procedural,[35] evidentiary,[36] and ethical[37] rules are also integral parts of the adversary process.[38] Procedural rules serve at least two vital functions in the adversary setting. First, they bring about a climactic confrontation in a single session or set of sessions.[39] In a short period of time, this confrontation presents the adjudicator with all the information used in the formulation of a decision. Such an arrangement intensifies the clash between the adversaries, diminishes the opportunity for the trier to undertake an independent factual investigation,[40] and helps to insure the trier's neutrality and passivity. Second, rules of procedure help insure that each adversary will be afforded an equal opportunity to make the best possible case. Foremost among the procedural equalizers is discovery. Information crucial to the pros-

---

33. *See The Search for Truth, supra* note 21:

> For many other judges, however, probably a majority at one time or another, the habit of adversariness tends to be rechanneled, at least in some measure, into a combative yearning for truth. With perhaps a touch of the convert's zeal, they may suffer righteously when the truth is being blocked or mutilated, turn against former comrades in the arena, feel (and sometimes yield to) the urge to spring into the contest with brilliant questions that light the way.

Id. at 1034; *The Unnecessarily Expanding Role, supra* note 7, at 7.

34. *See* notes 13-15 *supra;* Bazelon, *The Defective Assistance of Counsel,* 42 U. CIN. L. REV. 1, 16 (1973); *The Search for Truth, supra* note 21, at 1043; Uviller, *supra* note 21, at 1069.

35. For the purposes of this Article the rules of procedure shall be defined as all those regulations established to govern the litigation process, from the initiation of a lawsuit to the resolution of that lawsuit with the exception of those rules governing the presentation of evidence as defined in note 36 *infra.*

36. For the purposes of this Article the rules of evidence shall be defined as those regulations established to govern the presentation of testimony and other proofs at trial.

37. For the purposes of this Article the rules of ethics shall be defined as those regulations established to govern the professional conduct of attorneys.

38. *See* PRETRIAL DISCOVERY, *supra* note 7, at 15.

39. *See* THE ACTIVE ROLE OF THE JUDGE, *supra* note 19, at 246-47; Kaplan, *An American Lawyer in the Queen's Courts: Impressions of English Civil Procedure,* 69 MICH. L. REV. 821, 841 (1971).

40. *See* note 39 *supra.*

ecution of a case may not be equally available to each of the litigants. Discovery, at least in theory, eliminates the possibility that one party will be able to profit from information unavailable to his opponent or withhold pertinent information from that opponent.[41]

Another constituent part of the adversary system is a detailed set of evidentiary rules. Because its fundamental purpose is to protect the integrity of the evidentiary process, categories of evidence that have been determined to be unreliable, and therefore, capable of misleading the trier, are excluded by evidentiary rules.[42] The hearsay rule illustrates this proposition. Hearsay is inadmissible because the reliability of out of court statements is subject to question and cannot be tested during the trial by the procedures usually available for that purpose.[43] A number of other evidentiary rules work in similar fashion to bar the introduction of untrustworthy material.[44] The rules of evidence are also designed to insulate

---

41. At about the time of its introduction discovery was bitterly attacked as antithetical to the adversary process. Discovery was said to undercut the efficacy of the adversary system by allowing counsel for one party to profit parasitically from the efforts of his opponent. PRETRIAL DISCOVERY, *supra* note 7, at 11 and materials cited at n.9 therein. Despite these early claims, discovery has not served to dampen the adversary spirit. Rather, it has been fully integrated into the adversarial process. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 709 (1974); Hickman v. Taylor, 329 U.S. 495 (1947).

It should be noted that discovery devices have been abused. Some critics have claimed that discovery frequently serves to defeat justice by delaying cases or by allowing the weak to be overborne by the strong. *See, e.g.*, Burger, *How to Break the Logjam in the Courts*, U.S. NEWS & WORLD REP., Dec. 17, 1977, at 24; Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 202 (1976); Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 221-22 (1979).

42. *See* Goodhart, *supra* note 8, at 760-61; Saltzburg, *A Special Aspect of Relevance: Countering Negative Inferences Associated with the Absence of Evidence*, 66 CAL. L. REV. 1011, 1015-16 (1978); Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 989-90 (1973) [hereinafter cited as *The Harm of Harmless Error*].

43. *See* THE PARENCHYMA OF LAW, *supra* note 21, at 62-64; THE TRIAL OF THE FUTURE, *supra* note 9, at 27-28; 5 J. WIGMORE, *supra* note 11, at § 1362.

44. *See, e.g.*, FED. R. EVID. 701 (opinion testimony by lay witness); FED. R. EVID. 901 (requirement of authentication or identification); FED. R. EVID. 1002 (requirement of original).

The hearsay, opinion, best evidence, authentication, and similar rules are not generally utilized in the continental, inquisitorial adjudicatory process. These rules have been criticized by a number of scholars because they "suppress" valuable information. *See* Kunert, *Some Observations on the Origin and Structure of Evidence Rules Under the Common Law System and the Civil Law System of 'Free Proof' in the German Code of Criminal Procedure*, 16 BUFFALO L. REV. 122, 127 (1967); *see also* A. EHRENZWEIG, *supra* note 21, at 264-65. In response to this criticism it has been asserted that the adversary process serves goals other than the disclosure of material truth and the rules of evidence play a part in achieving these goals. *See* notes 19-21 and accompanying text, *supra*.

the decision maker from exposure to evidence that, although reliable in itself, poses a serious threat of exciting prejudice against one of the parties.[45] This objective is advanced by rules which prohibit introduction of evidence that is more prejudicial than probative,[46] as well as by those which bar the use of evidence descriptive of one or another personal attribute of one of the litigants.[47]

Since the rough-and-tumble of adversary procedure exacerbates the natural tendency of advocates to seek to win by any means available,[48] the third set of rules upon which the adversary process relies places ethical constraints on the lawyer advocates. To insure the integrity of the process certain tactics are forbidden, such as those designed to harass or intimidate an opponent,[49] as well as those intended to mislead or prejudice the trier of fact.[50] In addition to their prohibitory function, the canons of ethics are intended to promote vigorous adversarial contests. They attempt to achieve this end by requiring that each attorney zealously represent his client's interests at all times.[51]

---

45. *See* R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE, 147-48 (1977); *Legal Decisionmaking, supra* note 13, at 387-88 n.4; *see also* Lempert, *Modelling Relevance*, 75 MICH. L. REV. 1021, 1036 (1977).

46. *See, e.g.*, FED. R. EVID. 403 (exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time).

47. *See, e.g.*, FED. R. EVID. 404 (character evidence not admissible to prove conduct); *see also* FED. R. EVID. 609 (impeachment by evidence of conviction of crime).

48. *See* PRETRIAL DISCOVERY, *supra* note 7, at 6-7; *The Search for Truth, supra* note 21, at 1037.

49. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (a lawyer shall not undertake any action that "would serve merely to harass or maliciously injure another."); DR 7-105(A) ("A lawyer shall not present, participate in presenting or threaten to present criminal charges solely to obtain an advantage in a civil matter.").

50. *See, e.g.*, ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2)-(6) (a lawyer shall not "knowingly advance" an unwarranted claim, conceal information he is required to disclose, "knowingly use perjured testimony," "knowingly make a false statement of law or fact," or "participate in the creation or preservation of evidence" he knows to be false); DR 7-102(B) (a lawyer is required to inform those affected of any fraud perpetrated by a client); DR 7-106(B) (a lawyer shall disclose "legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client"); DR-106(C) (a lawyer appearing before a tribunal shall not allude to irrelevant or inadmissible evidence, ask a question he does not believe is relevant for the purpose of degrading a witness or other person, "assert his personal knowledge of facts," "assert his personal opinion as to the justness of the cause," "engage in undignified or discourteous conduct," or "intentionally or habitually violate any established rule of procedure or evidence").

51. A central theme of the ABA CODE OF PROFESSIONAL RESPONSIBILITY is attorney loyalty to, and zealous advocacy on behalf of his client. Such behavior is mandated in the disciplinary rules which accompany at least four of the nine Canons of the Code. *See* ABA

To help insure adherence to the rules and principles regulating the adversary process, a system of appellate courts has been incorporated into the adversary framework.[52] Appellate judges review the records of trial proceedings and determine whether the various legal prescriptions have been obeyed. If error is found, appellate courts are authorized to utilize any one of a number of remedies. Available remedies include modification, vacation, or reversal of a lower court's judgment to redress the harm done.[53] Appellate review also encourages attorneys and judges at the trial level to adhere to the requirements of the adversary process in order to avoid reversal on appeal.[54]

II. THE MEASURED PACE OF ADVERSARY PROCEEDINGS

The American adversary process is not designed to adjudicate individual cases speedily. Rather, almost all the basic components of the process serve to retard the progress of cases toward resolution. The process as a whole appears intentionally designed to increase the amount of time a decisionmaker spends considering each case. The cost of such an approach is clearly measurable in terms of delay.

Adversary theory requires the judge to remain passive until

CODE OF PROFESSIONAL RESPONSIBILITY Canons 4-7 and accompanying Disciplinary Rules; THE ACTIVE ROLE OF THE JUDGE, *supra* note 19, at 240-41; *see also* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470 (1966).

52. *See* St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901, 910 (1971); Rosenberg, *Devising Procedures that Are Civil to Promote Justice That Is Civilized*, 69 MICH. L. REV. 797, 803 (1971).

While appellate review serves to help insure the integrity of the adversarial process it also serves a number of other ends as well. These include appellate judges using "the cases before them as vehicles for stating and applying constitutional principles, for authoritatively interpreting statutes, for formulating and expressing policy on legal issues of system-wide concern, for developing the common law, and for supervising each level of the system below them." Hufstedler, *supra* at 910; *see* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, *passim* (1921).

53. *See, e.g.*, 28 U.S.C. §2106:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgement, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

54. *See* R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50, 80-81 (1970); *The Harm of Harmless Error*, *supra* note 42, at 1014-15 n.89.

the conclusion of the advocates' presentations. He is not free to conduct an independent inquiry or otherwise accelerate the pace of proceedings. The judge's passivity undoubtedly slows adjudication.[55] When a jury is used as decisionmaker, proceedings are even slower due to the extra time spent selecting the jurors and presenting the case.[56] Passivity is relied upon in the adversary framework to insure that the trier will remain neutral until he renders his decision. Neutrality, in turn, tends to insure the integrity of adversary deliberations. In this context, as well as a number of others, the adversary system appears to sacrifice speed in an effort to protect the probity of the process.[57]

The rules of procedure essential to the regulation of the adversary contest also slow the pace of litigation. Adversary procedure assures each party ample opportunity to prepare and present his case.[58] This preparation and presentation time, dependent as it is

---

55. *See* PROCEDURAL JUSTICE, *supra* note 7, at 6-7 (party control over procedure is "time-consuming"); *Efficient Procedure, supra* note 31, at 376 (participant control increases "transactional costs"); *but see* THE ACTIVE ROLE OF THE JUDGE, *supra* note 19:

> The first, which can be put very shortly, is simply that the greater the activity that is required of the court in the course of the litigation the greater the work load of judges and court officials. It has to be borne in mind, therefore, that even though a transfer of initiative from the parties to the court might improve the efficiency with which individual cases are handled, the overall effect of such a transfer on the ability of the courts to get through their total work load in a reasonable time would actually be adverse.

Id. at 265.

56. *See* DELAY IN THE COURT, *supra* note 1, at 8-9 (bench trials are "about 40 percent less time-consuming" than jury trials); THE TRIAL OF THE FUTURE, *supra* note 9, at 105-06 (jury trial perhaps "two and one-half times as long as" nonjury case); *but see* T. CHURCH, JR., JUSTICE DELAYED THE PACE OF LITIGATION IN URBAN TRIAL COURTS 32 (1978) ("Courts that dispose of a relatively high proportion of their civil cases by jury trial are neither less productive nor slower than courts with lower trial utilization."); THE PARENCHYMA OF LAW, *supra* note 21, at 66 ("[The] jury, by its very nature, promotes expedition of decision—the jury *must* decide, or be discharged. Judges often can, and too often unfortunately do, delay decision indefinitely.").

57. *See* United States v. Ewell, 383 U.S. 116, 120 (1966) ("[I]n large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecutions are designed to move at a deliberate pace."); California Apparel Creators v. Weider of California, Inc., 162 F.2d 893, 903 (2d Cir. 1947) (Hand, J., dissenting) (justice depends on a "thorough, though dilatory, examination of the facts"); Miller, *A Program for the Elimination of the Hardship of Litigation Delay*, in SELECTED READINGS: COURT CONGESTION AND DELAY 2 (G. Winters ed. 1971).

58. *See, e.g.*, Herring v. New York, 422 U.S. 853 (1975) (defendant in nonjury criminal case has a constitutional right to make a final summation); PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION 85 (1958) (remarks of then Judge William J. Brennan, Jr.) [hereinafter cited as PROCEEDINGS]; Miller, *supra*

on the vagaries of legal practice and advocate efficiency, does not lead to nearly as swift a decision as would a process primarily concerned with judicial inquiry rather than party presentation.[59] However, by allowing both sides to be heard in full, the adversary process tends to expand the pool of information available to the decisionmaker. This arguably increases the likelihood the trier will be able to render a decision that satisfies the needs of the litigants.[60]

The use of a strict set of rules of evidence to prevent the introduction of prejudicial or misleading information slows the adversary process. Before evidence may be introduced its pedigree[61] and trustworthiness[62] must be stipulated or demonstrated. Testimony from witnesses may be elicited only be means of a series of precisely formulated questions. These procedures invite careful scrutiny of each question and each answer. It is this careful control of the fact gathering process that undoubtedly slows the tempo of adversary proceedings.[63]

Finally, the adversary process relies upon appellate review to insure obedience to the codes regulating ligitation.[64] In effect, the appellate mechanism gives each party a chance to be heard at least twice. Appellate review undercuts finality of judgment and thereby allows litigants to prolong the adjudicary process substantially.[65] Again, the adversary method appears to sacrifice speed in an effort to enhance the integrity of deliberations.

III. The Rhetoric of Swift and Certain Justice and the Declining Use of Adversary Procedure in American Courts

Notwithstanding the claim that ours is an adversary system,

---

note 57.

59. *See* note 55 *supra.*

60. *See* note 31 *supra.*

61. *See, e.g.,* Fed. R. Evid. 901 (requirement of authentication or identification); Fed. R. Evid. 1002 (requirement of original).

62. *See, e.g.,* Fed. R. Evid. 801-04 (the hearsay rule and its exceptions).

63. *See* Delay in the Court, *supra* note 1, at 100; Douglas, *Perspectives on Justice in a Changing Society,* in Justice On Trial 14 (D. Douglas & P. Noble eds. 1971); Redish, *supra* note 28, at 506-07; Rosenberg, *supra* note 6, at 1361.

64. *See* note 52 *supra.*

65. *See* Hazard, *After the Trial Court—The Realities of Appellate Review,* in The Courts, The Public, And The Law Explosion (H. Jones ed. 1965); Pound, *supra* note 2, at 287-88; *Interview with Chief Justice Warren E. Burger,* U.S. News & World Rep., Dec. 14, 1970, at 35 [hereinafter cited as *"Burger Interview"*].

there are many indications that reliance on the adversary principle is declining. This decline has been accompanied by judicial and scholarly criticism that various facets of the adversary process are delay ridden and inefficient. While criticism premised upon delay has not been the sole reason for change,[66] it has profoundly affected the quality of debate concerning retention of the adversary process and has greatly facilitated the adoption of nonadversarial

66. It is beyond the scope of this Article to analyze in detail all the reasons for the decline of the adversary system. However, it seems relatively clear that certain economic and social forces have served to weaken the foundation upon which the adversary system was erected. The modern adversary concept would appear to have been the product of the *laissez faire* philosophy relied upon in England and America in the Eighteenth and Nineteenth Centuries to order economic, social, and legal affairs. *See* J. FRANK, *supra* note 7, at 92; Frankel, *The Conflict Between Self Interest and Justice*, 16 JUDGES' J. 8 (Summer 1977) [hereinafter cited as *Self Interest and Justice*] (for a somewhat different version of the same materials see *Toward Public Justice, supra* note 7); *see also* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 xv, 101-08 (1977). This *laissez faire* philosophy produced a legal system preoccupied with the claims and rights of individual litigants. *See* J. FRANK, *supra* note 7; Self Interest and Justice, supra.

The individualistic adversary approach came under increasing attack from the end of the Nineteenth Century on. It was, to a significant degree, inconsistent with what Max Weber has described as the requirement of modern "bureaucratic" government and industry, that official business be dispatched with "utmost possible speed, precision, definiteness and continuity . . . ." M. WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY 350 (M. Rheinstein ed. 1954). It was also at odds with the growing demand for a sort of "social justice" that placed equality ahead of "private freedom." Cappelletti, *Social and Political Aspects of Civil Procedure—Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847, 883-84 (1971). Further, it may have been incapable of handling the great volume of cases generated by a complex industralized society.

One response to the problems posed by the adversary system was to narrow its jurisdiction. A familiar example of this trend was the development of workmen's compensation boards to resolve questions of worker injuries. *See* Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 801-02 (1967); *see also Small Claims Court, supra* note 9, at 607-08 (creation of small claims courts as a retreat from adversarial process). More recently a number of influential commentators have recommended that judicial adversary procedure be even more narrowly circumscribed. *See, e.g.*, H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW *passim* (1973) (recommending nonadversarial approach to civil rights, railway workers' injury, seamen's injury, antitrust, and other sorts of litigation); Bell, *Crisis in the Courts: Proposals for Change*, 31 VAND. L. REV. 3, 7 (1978)(advocating arbitration as an alternative to adversarial adjudication in certain kinds of federal civil cases).

A second response to the problems posed by the adversary process was for the courts to alter the manner in which they conducted business. In 1976 Professors Friedman and Percival undertook an analysis of the workload of courts in two California counties from 1890 to 1970. Their conclusion was that over the years these courts devoted an ever decreasing amount of time to resolving disputes between adversaries and an ever increasing amount of time to handling "administrative" functions. Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 L. & SOC'Y REV. 267, 296-301 (1976) [hereinafter cited as *A Tale of Two Courts*].

methods.

In many instances, the availability of adversary procedure has been curtailed or one of the fundamental components of the process has been altered. Change has, for the most part, been linked to the rhetoric of swift and certain justice. It has usually been accomplished without discussion of the implications of reform on the survival of the adversary method of adjudication. The means by which change has been made, rather than the merit of any particular modification, is the subject of this section. In succeeding sections, the wisdom of dismantling the adversary process in this manner will be considered.

The critics of adversary procedure have pressed their arguments concerning delay with remarkable rhetorical vigor.[67] Prominent members of both bench and bar have contended that delay causes a host of grave problems. These problems include the denial of justice,[68] the destruction of the populace's faith in the courts,[69] and the increase of crime.[70] Some critics have portrayed delay as a menace to the very survival of the judicial branch of government.[71] Based on this sort of criticism, reformers have sought to curtail the

---

67. *See, e.g.*, M. FLEMING, THE PRICE OF PERFECT JUSTICE, 54-72 (1974); J. FRANK, *supra* note 8, at 2-28; PROCEEDINGS, *supra* note 58, at 138-39; *A Call for Action, supra* note 6; O'Neill, *How to Force Faster Litigation*, 18 JUDGES' J. 7 (Winter 1979); Pound, *supra* note 2; Rosenberg, *supra* note 52.

68. *See, e.g.*, PROCEEDINGS, *supra* note 58, at 48-49 (remarks of Cecil E. Burney reiterating proposition that "justice delayed is justice denied"); Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 932 ("delays in trials are often one of the gravest threats to individual rights"); *A Call for Action, supra* note 6, at 739.

69. *See, e.g., Deficiencies in Judicial Administration: Hearings on S. 3289, The National Court Assistance Act, Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary of the United States Senate*, 91st Cong., 2d Sess. 45 (1970) (statement of William H. Adkins II) ("I believe it is delay which forms the basic reason for citizen dissatisfaction with our courts.").

70. *See, e.g.*, Burger, *The Views of the Chief Justice*, LIFE Aug. 7, 1970:

> Many people, though not all, will be deterred from serious crimes if they believe that justice is swift and sure. Today no one thinks that it is. If there is a general impression that the administration of justice is not working, one important result is that the deterrent effect of law and punishment is impaired or lost.

Id. at 26; Rosenberg, *supra* note 52, at 808-09.

71. *See, e.g.*, H. FRIENDLY, *supra* note 66, at 3 (the federal courts "have more work than they can properly do" and "are faced with the prospect of a breakdown"); McDonald, *A Center Report/Criminal Justice*, CENTER MAGAZINE, Nov. 1968, at 69 (quoting remarks of then United States Court of Appeals Judge Warren Burger) ("The American system, up to the time of the final verdict and appeal, puts all the emphasis on techniques, devices, mechanisms. It is the most elaborate system ever devised by a society. It is so elaborate that in many places it is breaking down. It is not working.").

use of adversary process. To accomplish this end, critics have urged that settlement rather than adjudication be used to resolve most disputes.[72]

Settlement is not necessarily antithetical to the adversary process. A high percentage of settlements may even be intrinsic to an adversarial system.[73] Today, over ninety percent of all cases are settled,[74] and the proportion of settlements is growing.[75] If this trend continues, the percentage of settlements may become so great and the pressure for settlement so intense, adversarial reliance on contested trials will be compromised.[76]

---

72. *See, e.g.*, T. CHURCH, *supra* note 56, at 34 n.25; H. WILL, R. MERHIGE, JR., & A. RUBIN, THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS (1977) (remarks of Judge Hubert Will at a panel presentation for newly appointed federal district judges sponsored by the Federal Judicial Center) [hereinafter cited as THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS]; Flanders, *supra* note 14, at 160 (citing the remarks of Judge Ruggero Aldisert); Title, *New Settlement Techniques for the Trial Judge*, 18 JUDGES' J. 42, 49 (Winter 1979).

73. *See* DELAY IN THE COURT, *supra* note 1, at 108; Feeley, *Perspectives on Plea Bargaining*, 13 L. & SOC'Y REV. 199, 200 (1979); Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1022 (1974).

74. *See* DELAY IN THE COURT, *supra* note 1, at 108 (only 2 or 3 percent of all claims are tried to verdict); Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499 (1971) (approximately 90 percent of all defendants enter guilty pleas in criminal cases); Rubin, *The Managed Calendar: Some Pragmatic Suggestions about Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Court*, 4 JUST. SYS. J. 135, 137 (1978) (92 percent of civil cases filed in the United States District Courts "were terminated prior to trial"); Thompson, *How to Get the Case Flow Moving*, 18 JUDGES' J. 13, 14 (Winter 1979) ("well over 90 percent" of all civil cases "are settled before full trial and judgment").

75. *See A Tale of Two Courts*, *supra* note 66, at 286-87 (significant rise in percentage of uncontested judgments since 1890); Lempert, *More Tales of Two Courts: Exploring Changes in the 'Dispute Settlement Function' of Trial Courts*, 13 L. & SOC'Y REV. 92, 101 n.11 (1979) (in 1970, 18 percent fewer cases resolved by contested judgment in Alameda County than in 1890, 14 percent reduction in contested judgments in San Benito County during same time period).

76. *See* DELAY IN THE COURT, *supra* note 1, at 108 ("As a matter of policy, it is very doubtful whether the 2 or 3 percent of all claims that are tried to verdict should be reduced any further. It is quite possible they constitute the core of cases which *ought* to be litigated.") (emphasis in the original); Watkins, *Remedies for Court Congestion*, in JUSTICE ON TRIAL 179 (D. Douglas & P. Noble eds. 1971); Greene, *Court Reform: What Purpose?*, 58 A.B.A.J. 247, 250 (1972) ("pleas of guilty would be presumed to be the result of undue influence whenever their rate exceeded 90 or 95 percent of all convictions in a particular court").

Some commentators feel that the percentage of settlements has already compromised adversarial reliance on contested trials. *See* Bazelon, *New Gods for Old: 'Efficient' Courts in a Democratic Society*, 46 N.Y.U. L. REV. 653, 663-64 (1971) (criminal plea bargaining seeks to persuade "defendants to forego the very rights that government is established to secure" and has substituted the values of "the marketplace" for those appropriate to the criminal justice system); Blumberg, *The Practice of Law as Confidence Game: Organizational Coop-*

The upward surge in the rate of settlements has been accompanied by judicial adoption of the rhetoric of swift and certain justice. In addition, the idea that routine cases should not be tried has been frequently endorsed. This is perhaps most apparent in the criminal context, where plea bargaining has received official judicial sanction. Almost without exception, judicial decisions approving the components of the plea system have been justified in terms of the need for speedy adjudication as well as conservation of judicial resources.[77]

A typical holding is the Supreme Court's opinion in *Santobello v. New York.*[78] Chief Justice Burger writing for the Court stated:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.[79]

The Supreme Court has not, in *Santobello,* or any other plea bargaining case, considered the potentially adverse effect of bargaining on the adversary process. It has apparently assumed that savings in judicial time and resources justify arrangements in which

---

tion of a Profession, 1 L. & SOC'Y REV. 15, 18-24 (1967) (the plea system has "coopted" the defense bar); Frankel, *supra* note 66, at 10-11 (the trial has become the "unused centerpiece" of our justice system).

77. *See, e.g.,* Corbitt v. New Jersey, 439 U.S. 212, 222 n.12 (1978); Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concommitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned . . . . Judges and prosecutors conserve vital and scarce resources."); Santobello v. New York, 404 U.S. 257, 261 (1971) (*see* text accompanying note 79 *infra*); Brady v. United States, 397 U.S. 742 (1970):

> For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Id. at 752 (footnote omitted); *see also* Bosco, *Some Comments Concerning the Roles of Judges, Prosecutors and Defense Attorneys in Plea Bargaining,* 1978 TRIAL LAW. GUIDE 377, 388; Langbein, *Understanding the Short History of Plea Bargaining,* 13 L. & SOC'Y REV. 261, 262 (1979).

78. 404 U.S. 257 (1971).

79. *Id.* at 260.

defendants are strongly encouraged to trade their right to trial for consideration in sentencing.[80]

The reformers have not only sought to reduce the number of cases tried by adversarial methods, they have attempted to alter the nature of the process itself. Basic components of the adversary system, such as judicial passivity, advocate responsibility for the development of cases, jury primacy, traditional rules of procedure and evidence, and thoroughgoing appellate review, have all been sharply criticized. Passivity has been challenged in a number of contexts. In the name of efficiency, judges have been admonished to take charge of settlement negotiations at the earliest moment,[81] to supervise the bargaining process,[82] to render opinions concerning issues not yet litigated,[83] and to settle as many lawsuits as possible.[84] A large number of judges have adopted these and similar practices.[85] The chief justification for change has been the claimed need for greater speed and efficiency.[86] Neither critics nor settlement oriented judges have paid much attention to apparent conflicts created between their approach and the principle of passivity, which has traditionally been viewed as limiting a judge's

---

80. For intimations that such an assumption is unwarranted, *see* note 74 *supra*.

81. *See, e.g.*, THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS, *supra* note 72, at 2; Title, *supra* note 72, at 44.

82. *See, e.g.*, THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS, *supra* note 72, at 5; Flanders, *supra* note 14, at 160; Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509 (1971).

83. *See, e.g.*, Title, *supra* note 72, at 44.

84. *See, e.g.*, THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS, *supra* note 72, at 1; Flanders, *supra* note 14, at 160; Title, *supra* note 72, at 42, 49.

85. *See, e.g.*, THE PARENCHYMA OF LAW, *supra* note 21, at 27; Bazelon, *supra* note 76, at 663-64; Church, *Civil Case Delay in State Trial Courts*, 4 JUST. SYS. J. 166, 175 (1978); Lambros, *supra* note 82, at 514-15; Title, *supra* note 72, *passim*.

86. *See* materials cited in notes 81-84 *supra*. However, research data have failed to support the proposition that active judicial participation in the settlement process increases the speed or efficiency of the courts. *See* Church, *supra* note 85:

> Those courts which exert the most effort in settling cases do not necessarily dispose of more cases per judge than those courts where less judicial settlement effort is expended. About the only obvious relationship . . . is the perfect *inverse* relationship between amount of court settlement activity and median disposition time. The most settlement-intensive courts are the slowest courts.

Id. at 176 (emphasis in the original).

There is even some support for the proposition that courts utilize heavy caseloads and attendant delay as "an excuse" to rely on plea bargaining rather than undertake the more onerous task of conducting adversary trials. *See* Rubin, *How We Can Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of the Criminal Law*, 70 F.R.D. 176, 185 n.26 (1976).

involvment in the compromise of a case.[87]

The champions of speedier litigation have challenged the principle of decisionmaking passivity in situations other than settlement. Generally, passivity has been said to undermine the ability of the trial judge to manage the cases before him efficiently.[88] The judge who passively awaits the development of the evidence by the parties is said to be unable to protect proceedings from delay and distortion caused by unskilled or excessively contentious counsel.[89] He is also said to be ill-equipped to meet the challenge of complex litigation.[90] Critics suggest that the cure for these problems is an increase in judicial authority to manage litigation both in and out of the courtroom.[91]

A marked expansion of the managerial powers of the trial judge has been associated with this assault on passivity. Today, judges are free to take an active part in both the preparation and presentation of lawsuits. Tools such as the pretrial conference and pretrial order are regularly used by judges to determine the pace and, to some extent, the direction of litigation.[92] Rules regulating judicial involvement at trial have been steadily liberalized. Judges have been ceded extensive authority to question witnesses called by the parties.[93] They have also been given broad powers to call

---

87. *See* note 14 *supra.*

88. *See, e.g.,* Oleck, *What to Do About Delay in Court,* in SELECTED READINGS: COURT CONGESTION AND DELAY, *supra* note 57, at 72 (citing remarks of Judge Irving Kaufman); Flanders, *supra* note 14, at 149-50 (citing remarks of Judge Hubert Will); Pound, *supra* note 2, at 281-82.

89. *See, e.g.,* J. FRANK, *supra* note 8, at 128 ("Counsel, unhappily, may be a long-winded, incompetent, contentious boob, and yet under the pure application of the adversary theory, the court has no function but to sit in place, rule on objections, and give instructions to the jury."); Burger, *supra* note 21, at 91; Pound, *supra* note 2, at 281-82.

90. *See, e.g., Efficient Procedure, supra* note 31, at 362 (citing Boyer, *Alternatives to Administrative Trial-type Hearings for Resolving Complex Scientific, Economic, and Social Issues,* 71 MICH. L. REV. 111, 145-46 (1972)); Rosenberg, *supra* note 6, at 1354-55.

91. *See, e.g.,* PROCEEDINGS, *supra* note 58, at 128 (reproducing remarks of Judge Holtzoff); O'Neill, *supra* note 67, at 7; Rubin, *supra* note 74, at 136, 140; Solomon, *Techniques for Shortening Trials,* 65 F.R.D. 485 (1974) ("There are many good ways to manage a calendar, control discovery and pretrial, and reduce trial time. Every good way requires the judge to be in control—he must closely supervise the cases from the time they are filed."); Frankel, *supra* note 7, at 522-24.

92. *See, e.g.,* Flanders, *supra* note 14, at 156 ("an important part of the developing ideology for case management has been comprehensive use of the pretrial order and the pretrial conference to refine issues and define the direction of the case"); Lambros, *supra* note 82; Oleck, *supra* note 88, at 72; Solomon, *supra* note 91, *passim.*

93. *See* FED. R. EVID. 614(b) ("The Court may interrogate witnesses, whether called by

witnesses.[94] There has even been some increase in the practice of judicial summary of and comment upon the evidence presented by the litigants.[95] All of this has appreciably altered the dynamics of the adversary process by encouraging judicial management at the expense of party control of proceedings.[96] The justification for these alterations has been that there is a need to conserve judicial time and increase courtroom efficiency.[97] Seldom has so much as a sidelong glance been devoted to the clash of the managerial concept with the adversary ideal of a passive and neutral decisionmaker.

The critics of the adversary process have coupled their efforts to expand the authority of the judiciary with attacks upon the competence of lawyers. It has been repeatedly asserted that a large, perhaps overwhelming, segment of the trial bar is incompetent.[98] The advocates of change also contend that attorney incom-

---

itself or by a party."); *The Unnecessarily Expanding Role, supra* note 7, at 52-61, n.253 (commenting on the behavior of Judge Sirica in the Watergate case).

94. *See* FED. R. EVID. 706 (court appointed experts); FED. R. EVID. 614(a) (calling witness by court); Kunert, *supra* note 44, at 163; *The Unnecessarily Expanding Role, supra* note 7, at 65-80.

95. *See The Unnecessarily Expanding Role, supra* note 7, at 22-52; *see also* Lakeside v. Oregon, 435 U.S. 333 (1978) (affirming power of trial judge to give cautionary instruction to jury concerning defendant's silence despite defendant's objection):

> In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel. But that right has never been understood to confer upon defense counsel the power to veto the wholly permissible actions of the trial judge. It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial. " '[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.' Quercia v. United States, 289 U.S. 466, 469 (1933)." Geders v. United States, 426 U.S. 80, 86 (1975).

Id. at 341-42.

96. *See* PROCEDURAL JUSTICE, *supra* note 7, at 123-24; Cappelletti, *supra* note 66, at 879-81.

97. *See generally* note 92 *supra; The Unnecessarily Expanding Role, supra* note 7, at 7-8 ("in an era of burgeoning caseloads, complex litigation, and overworked judges, it is readily apparent why some judges believe they must intervene at trial to maintain a reasonable pace and protect their dockets from unnecessary overcrowding").

98. *See, e.g.*, Burger, *A Sick Profession*, 27 FED. B.J. 228 (1967) (75-90% of lawyers inadequate in the courtroom); Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 236 (1973) (many lawyers are unable to examine, cross-examine, handle exhibits, develop the facts, or "observe the rules of professional manners and professional etiquette that are essential for effective trial advocacy.") [hereinafter cited as *Special Skills*]; Devitt, *Improving Federal Trial Advocacy*, 16 JUDGES' J., 40, 40-41 (Spring 1977) (citing the remarks of Justice Burger, Judge Bazelon and Judge Kaufman); Kaufman, *The Court*

petence is a major cause of inefficiency and delay.[99] This criticism has helped to undermine the confidence of both laymen and lawyers in trial attorneys.[100] It has contributed to a decline in the authority and importance of the trial bar and has facilitated the growth of judicial power in the management of the trial process.[101]

Along with the increase in judicial power and the decline of the trial bar has come an attack on the jury system. For at least seventy-five years the advocates of change in the adversary system have criticized the use of juries as decisionmakers.[102] Detractors have claimed that a judge can perform the decisionmaking function far more effectively than can a jury,[103] that juries decide in arbitrary and capricious ways,[104] and that juries are grossly incompetent to deal with complex issues.[105] However, the most frequently voiced criticism of the jury has been that it wastes valuable judicial time and resources.[106] Suggested solutions to the

---

Needs a Friend in Court, 60 A.B.A.J. 175, 176 (1974) (the bar suffers because many of its members demonstrate a "lack of experience, lack of competence, and lack of integrity"); *The Unnecessarily Expanding Role, supra* note 7, at 4-7, n.11.

99. *See, e.g.*, J. FRANK, *supra* note 8, at 33-34; *Special Skills, supra* note 98, at 234-35; *The Unnecessarily Expanding Role, supra* note 7, at 7-8.

100. For evidence of the trial lawyer's declining prestige *see* PROCEEDINGS, *supra* note 58, at 102 (remarks of Paul Dewitt); THE TRIAL OF THE FUTURE, *supra* note 9, at 142-43 (quoting the remarks of Judge J. Edward Lumbard); *The Unnecessarily Expanding Role, supra* note 7, at 4-7.

101. *See* Lay, *What Not to Learn from the British System—Demythologizing the Problem of Effective Advocacy*, 16 JUDGES' J. (Summer 1977) *passim; The Unnecessarily Expanding Role, supra* note 7, at 7-9.

102. *See, e.g.*, Lummus, *Civil Juries and the Law's Delay*, 12 B.U. L. REV. 487 (1932); Sebille, *Trial By Jury: An Ineffective Survival*, 10 A.B.A.J. 53 (1924); Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302 (1915).

103. *See, e.g.*, J. FRANK, *supra* note 7, at 126-27; Redish, *supra* note 28, at 504-05 (there is significant question concerning the "ability of twelve laymen to make accurate factual findings in a legal case").

104. *See, e.g.*, J. FRANK, *supra* note 7, at 114-15; Redish, *supra* note 28, at 502-03; Sebille, *supra* note 102, at 55 ("Too long has ignorance been permitted to sit ensconced in the places of judicial administration where knowledge is so sorely needed. Too long has the lament of the Shakesperian [sic] character been echoed, 'Justice has fled to brutish beasts and men have lost their reason.' ").

105. *See, e.g.*, Kirkahm, *supra* note 41, at 208-09 ("It is difficult to imagine a less appropriate mechanism for the determination of facts in a protracted and complicated suit than the civil jury."); Redish, *supra* note 28, at 505; Schaefer, *Is the Adversary System Working in Optimal Fashion?*, 70 F.R.D. 159, 162 (1976).

106. *See, e.g.*, Landis, *Jury Trials and the Delay of Justice*, in JUSTICE ON TRIAL, *supra* note 76, at 116-20; Burger, *The State of the Federal Judiciary—1971*, 57 A.B.A.J. 855, 858 (1971); Devitt, *Federal Civil Jury Trials Should be Abolished*, 60 A.B.A.J. 570, 571 (1974) ("the cause of delay is the jury system" citing remarks of David Peck); McDonald,

problems caused by jury trial have included alteration of the jury selection process,[107] reduction of the size of juries,[108] diminution of the number of affirmative votes needed to support a verdict,[109] and outright abolition of the jury system.[110]

The question of whether the right to have a jury trial has been curtailed is a complex one. To some degree, the right has been insulated from dramatic alteration because of its incorporation in the Constitution[111] and endorsement in a significant number of Supreme Court decisions.[112] This legal foundation has insured the availability of some sort of jury in most cases. There is even evi-

---

supra note 71, at 71 (citing remark of then United States Court of Appeals Judge Warren Burger "if we could eliminate the jury we would have a lot of time"); Redish, *supra* note 28, at 506-07; Schaefer, *supra* note 105, at 161 ("One of these major defects is the extent to which trial by jury delays the disposition of cases.").

The accuracy of this criticism is open to question. *See* DELAY IN THE COURT, *supra* note 1, at 4; C. JOINER, *supra* note 21, at 71-72 ("When a case is tried before a judge, it does not proceed with the same dispatch as if it were tried before a jury.").

107. *See, e.g.*, Miller, *The National Conference on the Judiciary and Its Consensus*, 55 JUDICATURE 61, 63 (1971) (the consensus of the National Conference on the Judiciary recommended judges conduct the voir dire process to prevent "undue delay"); Oleck, *supra* note 88, at 71; *Reform on Their Minds, supra* note 26, at 190.

108. *See, e.g.*, Bogue & Fritz, *The Six-Man Jury*, 17 S.D. L. REV. 285, 285 (1972); *Burger Interview, supra* note 65, at 40 (smaller juries "would help in management, time and cost"); *Reform on Their Minds, supra* note 26, at 192 ("Approximately 40 percent of the judges [surveyed with a questionnaire designed by Professor Maurice Rosenberg] favor smaller juries, preferably of six members . . . . The attitude was that a smaller jury would simple [sic] contribute to time and cost efficiency.").

109. *See, e.g.*, FINAL REPORT, *supra* note 26, at 97; *Reform on Their Minds, supra* note 26, at 193.

110. *See, e.g.*, Burger, *supra* note 21, at 89; Devitt, *supra* note 106, *passim*; Landis, *supra* note 106, at 120; Rosenberg, *supra* note 52, at 818-19; Schaefer, *supra* note 105, at 165 ("The jury is an accustomed form, but the time is ripe to consider whether that form, valuable as it may be in criminal cases, has not outlived its usefulness in the world in which we live today.").

111. *See* U.S. CONST. art. III, § 2, cl. 2; U.S. CONST. amend. VI; U.S. CONST. amend. VII.

112. *See, e.g.*, Pernell v. Southall Realty, 416 U.S. 363 (1974) (Seventh Amendment entitles either party to demand jury trial in action to recover possession of real property in District of Columbia); Curtis v. Loether, 415 U.S. 189 (1974) (Seventh Amendment entitles either party to demand a jury trial in damage actions brought in federal court pursuant to § 812 of the Civil Rights Act of 1968); Duncan v. Louisiana, 391 U.S. 145 (1968) (Fourteenth Amendment makes Sixth Amendment's requirement of jury trial in "serious" criminal cases applicable to the States); Dairy Queen v. Wood, 369 U.S. 469 (1962) (Seventh Amendment right to jury trial preserved in cases where both equitable and legal issues are raised); Beacon Theatres v. Westover, 359 U.S. 500 (1959) (Seventh Amendment right to jury trial preserved in cases where both equitable and legal issues are raised); Byrd v. Blue Ridge Coop., 356 U.S. 525 (1958) (despite contrary state rule jury should decide factual issue in diversity action).

dence in some decisions of fairly recent vintage that the Court has continued to gradually expand the availability of juries.[113]

While the right to jury trial may not, in itself, have been significantly curtailed, procedures for its implementation have undergone a radical transformation. At the turn of the century, the Supreme Court held that a jury was required by law to be comprised of twelve jurors.[114] Almost simultaneously, the Court indicated that juries were expected to render unanimous verdicts.[115] It was also expected that juries would be impaneled only after opposing counsel had an opportunity to conduct a fairly extensive voir dire to ferret out biased jurors,[116] and after counsel had been permitted to exercise peremptory challenges to remove those veniremen who might harbor less than manifest prejudices.[117] All of these procedures have come under judicial review and have been either substantially narrowed or abandoned.

In *Williams v. Florida*[118] and *Colgrove v. Battin*,[119] the Su-

---

113. *See* cases cited in note 112 *supra;* Redish, *supra* note 28, at 494-95 n.33. However, there are a number of recent indications that the expansion of the jury trial right has come to a halt. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (Seventh Amendment not violated by offensive use of collateral estoppel to prohibit relitigation of finding made in prior equitable action); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (no trial by jury required in state juvenile delinquency proceeding); Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970) (in determining the applicability of the Seventh Amendment courts may consider "the practical abilities and limitation of juries"); *see also* Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979).

114. *See* Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899) (trial by jury within the meaning of the Seventh Amendment requires a panel of twelve); Thompson v. Utah, 170 U.S. 343, 349 (1898) ("[t]he jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less.") (citations omitted); *see also* Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 672-73 (1918).

115. *See* Andres v. United States, 333 U.S. 740, 748-49 (1948); Patton v. United States, 281 U.S. 276, 288-90 (1930); Hawaii v. Mankichi, 190 U.S. 197, 211-12 (1903); Maxwell v. Dow, 176 U.S. 581 (1900); Thompson v. Utah, 170 U.S. 343, 355 (1898); *see also* Scott, *supra* note 114, at 673-74.

116. *See* Swain v. Alabama, 380 U.S. 202, 218-19 (1965) ("The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories, and the process of selecting a jury protracted."); Levit, Nelson, Ball & Chernick, *Expediting Voir Dire: An Empirical Study*, 44 S. CAL. L. REV. 916, 922 (1971) [hereinafter cited as *Expediting Voir Dire*].

117. *See* Swain v. Alabama, 380 U.S. 202, 212-17, 219-20 (1965); Pointer v. United States, 151 U.S. 396, 408 (1894); Hayes v. Missouri, 120 U.S. 68, 70-71 (1887); *see also* Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493, 1502-03 n.37 (1975) [hereinafter cited as *Minimum Standards*].

118. 399 U.S. 78 (1970).

preme Court overturned its prior decisions concerning twelve person juries. In each case the Court approved the use of as few as six jurors. It appeared to base its holding on two propositions: first, that the requirement of a jury of twelve was a "historical accident,"[120] and second, that six could function as well as twelve in carrying out the tasks assigned the jury.[121] To support the latter conclusion, the Court cited and appeared to rely upon a number of articles dealing with the deliberations of six member juries or other small groups.[122] In *Johnson v. Louisiana*[123] and *Apodaca v. Oregon*,[124] the Court held that a unanimous jury verdict was not required in state court criminal trials. In so holding a majority of the members of the Court appeared to rely upon the two-pronged analysis previously set forth in *Williams*.[125]

On their face, these four decisions do not appear to have been motivated by a desire to promote speed or efficiency. Only in the *Johnson* case is there any specific reference to or reliance upon a

---

119. 413 U.S. 149 (1973).

120. Williams v. Florida, 399 U.S. at 89; *see also, And Then There Were None, supra* note 25, at 712.

121. The Court took a narrow view of the function of the jury. In the criminal context it defined that function as the prevention of "oppression by the Government." Williams v. Florida, 399 U.S. at 100. As the Court continued:

> [g]iven this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. The performance of this role is not a function of the particular number of the body that makes up the jury.

Id.

In the civil context the Court said the function of the jury was "to assure a fair and equitable resolution of factual issues." Colgrove v. Battin, 413 U.S. at 157. It saw no significant distinction between six and twelve member panels in discharging this function. *Id.* at 157-58.

Remarkable in this analysis is the absence of any careful consideration of the function of the jury in achieving the adversary system goal of decisionmaking neutrality.

122. *See* studies cited in Williams v. Florida, 399 U.S. at 101 nn.48 & 49; Colgrove v. Battin, 413 U.S. at 159-60 n.15; Lempert, *supra* note 25, at 644; *And Then There Were None, supra* note 25, at 713-15; Zeisel & Diamond, *Convincing Empirical Evidence on the Six Member Jury*, 41 U. CHI. L. REV. 281, 281-82 (1974) [hereinafter cited as *Convincing Empirical Evidence*].

123. 406 U.S. 356 (1972).

124. 406 U.S. 404 (1972).

125. Apodaca v. Oregon, 406 U.S. at 406-11. ("After considering the history of the 12-man requirement and the functions it performs in contemporary society, we concluded that it was not of constitutional stature. We reach the same conclusion today with regard to the requirement of unanimity.") *Id.* at 406.

state interest to "facilitate, expedite, and reduce expense in the administration of criminal justice."[126] However, on closer examination it becomes clear that the arguments advanced to justify *Williams* and its progeny are insufficient. The notion of efficiency appears to be the only basis upon which the decisions may be defended.

In *Ballew v. Georgia*,[127] various members of the Court admitted that the decisions were based on efficiency. There all the Justices agreed that a jury of five was too small to perform the jury function effectively. Justice Blackmun gave several reasons why five jurors were not enough. Among the reasons were that "progressively smaller juries are less likely to foster effective group deliberation,"[128] that there are "doubts about the accuracy of the results achieved by smaller and smaller panels,"[129] that "the verdicts of jury deliberation in ciminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense,"[130] and that "reduction in size will erect additional barriers to [minority group] representation."[131] It is clear that these propositions apply with almost equal force to six-member juries.[132] Additionally, it is clear, both from *Ballew* and the critical literature, that the empirical studies upon which *Williams* was premised are open to serious question.[133] Justice Blackmun's opinion in *Ballew* suggests only one alternative rationale, "[s]avings in court time and in financial costs."[134] From all the available evidence this appears to be the only enduring explanation for the changes adopted in *Williams* and subsequent cases.

The changes made with respect to jury size and unanimous verdicts have effectively reduced the reliability[135] and neutrality of

---

126. Johnson v. Louisiana, 406 U.S. at 364, *quoting* State v. Lewis, 129 La. 800, 804, 56 So. 893, 894 (1911).

127. 435 U.S. 223 (1978).

128. *Id.* at 232.

129. *Id.* at 234.

130. *Id.* at 236.

131. *Id.* at 237.

132. *Id.* at 239 ("We readily admit that we do not pretend to discern a clear line between six members and five."); Zeisel, *Twelve Is Just*, TRIAL, 12 (Nov./Dec. 1974) [hereinafter cited as *Twelve Is Just*].

133. *See* Ballew v. Georgia, 435 U.S. at 231-39 nn.10-32, 242-43 nn.34-37.

134. *Id.* at 243-44.

135. *See id.* at 232-35; Lempert, *supra* note 25, at 685-89; *Convincing Empirical Evidence*, *supra* note 122, at 294; *Twelve Is Just*, *supra* note 132, at 15.

juries.[136] These decisions have thus reduced the utility of jury trials in achieving the adversary system's goals of decisionmaker neutrality and passivity. They have also made the jury a far less predictable and attractive option to litigants, thereby effectively curtailing the right to jury trial.[137] This change was accomplished without meaningful discussion of its impact upon the adversary system or consideration of the values vindicated by either the unanimity or twelve juror requirement.[138]

The scope of voir dire in criminal cases was addressed by the Supreme Court in *Ham v. South Carolina.*[139] The Court held that while inquiry into matters of racial bias might be constitutionally required if a state had established a voir dire procedure, examination concerning other sources of bias could, in a trial court's discretion, be omitted.[140] As Justice Marshall noted in his dissent in *Ham,* this holding vests trial judges with the power to undermine the selection of an impartial jury by "totally foreclosing . . . reasonable and relevant avenues of inquiry as to possible prejudice."[141] In *Ristaino v. Ross,*[142] the Court went a step beyond *Ham* and held that there was *no* category of juror prejudice (including racial bias) that would, independent of the specifics of a given case, mandate inquiry on voir dire. The Court rejected the contention that *Ham* had required inquiry into questions of juror racial prejudice separate and apart from the circumstances of

---

136. *See* Ballew v. Georgia, 435 U.S. at 233 ("the smaller the group, the less likely it is to overcome the biases of its members"); Lempert, *supra* note 25, at 687.

137. *See And Then There Were None, supra* note 25:

> Whatever the extent of the "gamble" incurred through the twelve-member jury, we must expect that it will be significantly greater with a six-member jury. This increase in the "gamble" might well have an interesting side effect; it could increase the incidence of jury waiver and thereby reduce the frequency of jury trials.

Id. at 718-19 (footnote omitted).

138. The only consideration of this question came in Justice Douglas' dissent in Johnson v. Louisiana, 406 U.S. at 394 ("Proof beyond a reasonable doubt and unanimity of criminal verdicts and the presumption of innocence are basic features of the accusatorial system. What we do today is not in that tradition but more in the tradition of the inquisition.").

139. 409 U.S. 524 (1973).

140. *Id.* at 527-28. *See* Gaba, *Voir Dire of Jurors: Constitutional Limits to the Right of Inquiry into Prejudice,* 48 U. COLO. L. REV. 525, 537 (1977); *Minimum Standards, supra* note 117, at 1511.

141. Ham v. South Carolina, 409 U.S. at 531; *Minimum Standards, supra* note 117, at 1510, n.77.

142. 424 U.S. 589 (1976).

Ham's trial.[143] In *Ross*, the Court approved, in effect, the impanelment of potentially biased jurors except when the facts of the case "were likely to *intensify* any prejudice that individual members of the jury might harbor."[144]

Ham and *Ross* not only expanded tolerance of juror prejudice, they also approved a method for the administration of voir dire that cedes wide ranging powers to the trial judge while shrinking to insignificance the role of trial counsel in the inquiry process. Except in unusual circumstances, the trial judge is free to pick and choose the topics to be covered and the questions to be asked. The method approved in *Ham* and *Ross* also serves to undermine the value of peremptory challenges. It is unlikely that the judge dominated voir dire will be used to explore the latent biases of veniremen.[145] This curtailment of peremptories is consonant with other action initiated by the Supreme Court in an effort to reduce the scope of the peremptory challenge.[146]

Neither *Ham* nor *Ross* sets forth any clear reason for the Court's endorsement of a judge centered, narrowly circumscribed voir dire procedure. However, it is reasonably clear that the Court hoped by its action to effect savings in judicial time and public funds. A number of commentators have reached this conclusion[147] and at least one member of the Court advanced such a rationale in public comment concerning voir dire.[148] What has not been can-

---

143. *Id.* at 595-96. *See* Gaba, *supra* note 140, at 539-41.

144. 424 U.S. at 597 (emphasis added). *See* Gaba, *supra* note 140, at 540-42 ("by focusing on the issues of the trial, rather than the possible bias of venirepeople, the court virtually gave constitutional sanction to the presence of biased individuals on a jury").

145. *See* Babcock, *Voir Dire: Preserving 'Its Wonderful Power,'* 27 STAN. L. REV. 545, 548-49 (1975).

146. *See* the proposed rule and Advisory Committee Note concerning the amendment of Federal Rule of Criminal Procedure 24(b). H.R. DOC. No. 464, 94th Cong., 2d Sess. 12-15 (1976) (recommending the reduction of the number of peremptory challenges available to criminal defendants). *But see* S. REP. No. 354, 95th Cong., 1st Sess. 9, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 527, 532-33 (rejecting the proposed amendment).

147. *See* Ham v. South Carolina, 409 U.S. at 534 (Marshall, J., dissenting) ("I cannot believe that in these circumstances an absolute ban on questions designed to uncover such prejudice represents a proper balance between the competing demands of fairness and expedition."); Gaba, *supra* note 140, at 532; *Minimum Standards*, *supra* note 117. *See also Expediting Voir Dire*, *supra* note 116, at 923 n.28 (identifying a number of trials held between 1967 and 1971 in which voir dire was lengthy and a cause of judicial concern).

148. *See* Babcock, *supra* note 145, at 545 n.3 (citing the address of Chief Justice Burger to the National Conference on the Judiciary on March 12, 1971); Burger, *supra* note 21, at 92.

vassed in the Court's opinions is the impact of diminished voir dire on the adversary process. It seems fairly evident that reduction of voir dire and coordinate discounting of the value of peremptory challenges diminish the likelihood that a neutral and unbiased jury will be selected.[149] The reduction of voir dire thereby undermines a central goal of the adversary system.

The procedural and evidentiary rules governing the adversary process have also been the targets of reformers seeking to speed judicial operations. Critics have suggested that the detailed rules governing the judicial process are dilatory and should be substantially curtailed in favor of more efficient procedures relying extensively on the exercise of trial court discretion.[150] Those responsible for the redrafting of procedural codes have, to a certain extent, adopted a similar attitude.[151]

While all changes in the rules governing judicial proceedings have not sought speed at the expense of adversary principles, quite

---

149. *See* Gaba, *supra* note 140, at 527 & n.12.

150. *See, e.g.*, J. FRANK, *supra* note 8, at 86-90 (the various rules of procedure have in many instances multiplied the "decision points costly in both time and dollars"); Pound, *supra* note 2, at 284 (court procedure has caused "[u]ncertainty, delay and expense, and above all, the injustice of deciding cases upon points of practice, which are the mere etiquette of justice . . ."); Scott, *Pound's Influence on Civil Procedure*, 78 HARV. L. REV. 1568, 1671 (1965) (Pound strongly advocated judicial discretion in the vindication of procedure "intended solely to assure the orderly dispatch of business.").

151. A desire to speed the functioning of the courts played a significant role in the process leading to the adoption of the Federal Rules of Civil Procedure. *See, e.g.*, Cummings, *Modernizing Federal Procedure*, 24 A.B.A.J. 625, 626 (1938). *See also* FED. R. CIV. P. 1 (the Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action"). Similar desires were at work in states which adopted rules akin to those set forth in the Federal Rules of Civil Procedure. *See, e.g.*, Covington & Reese, *Court Delay—Texas Style*, 4 HOUS. L. REV. 92, 95 & n.13 (1966).

The expanding role of discretion in the rules of procedure has been delineated by Professor Rosenberg in Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173 (1978):

> I once searched the Federal Rules of Civil Procedure from start to finish to discover how many times the word "discretion" occurs. It turned up only ten times. Yet if one reads the decisions of the United States Courts of Appeals and reviews the major treatises, one finds at least forty procedural situations in which the courts of appeals have construed a rule to grant discretion to the district court. The decisions have recognized discretion in the ten rules in which it explicitly appears and additionally in at least three times as many rules in which there is no reference to the word. That would lead to you to think that it is not important whether discretion is expressly written into the rule or not. Rather, it depends on whether the appellate courts think it should have been there.

Id. at 174.

often in recent years amendments to the rules of procedure and evidence have overlooked adversary concerns or expanded the discretion of trial judges at the expense of the adversaries. Outstanding examples of these tendencies may be found in the recently adopted Federal Rules of Evidence. In these rules the trial judge has been given discretion with respect to a wide variety of matters, including the manner to proceed in determining a preliminary question of fact,[152] the applicability of the hearsay rule,[153] and the permissibility of using various techniques of cross-examination.[154]

---

152. FED. R. EVID. 104(a):

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

See Kaplan, *supra* note 21, at 1010.

153. FED. R. EVID. 803(24):

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

See FED. R. EVID. 804(b)(5); Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEXAS L. REV. 167, 169 (1979). *But see* S. REP. No. 1277, 93d Cong., 2d Sess. 18-20, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7051, 7065-66.

154. FED. R. EVID. 611:

> *(a) Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> *(b) Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
>
> *(c) Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony.

The revision of the rules has also reduced the likelihood that categories of evidence previously adjudged unreliable or prejudicial will be excluded. Limitations on the exclusion worked by the hearsay rule well illustrate this point.[155] Change has been made without extensive consideration of its impact on the adversary process.

Finally, the advocates of a speedy judicial process have focused critical attention on the courts of appeal. They have argued that the sort of review envisioned as a part of the adversary process is costly and inefficient.[156] Critical attacks have been sharpest in the criminal context, where a defendant's persistent utilization of appellate procedures has been branded "warfare with society."[157] The critics have suggested that a variety of measures be taken to curtail the availability of appeals.

The Supreme Court has never held that there is an absolute

> Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

See Martin, *supra* note 153, at 169 n.8.

155. In addition to the open-ended hearsay exceptions of FED. R. EVID. 803(24) and 804(b)(5) the Federal Rules of Evidence have authorized the use of hearsay in a variety of contexts. *See, e.g.*, FED. R. EVID. 104(a) (hearsay may be used by the judge in adjudicating preliminary questions of admissibility of evidence); FED. R. EVID. 703 (expert may rely on hearsay in formulating his opinions). Further, certain out-of-court actions which were traditionally considered hearsay are defined as nonhearsay under the Federal Rules. *Compare* Wright v. Tatham, 112 Eng. Rep. 488 (Ex. 1837) (out-of-court action treated as equivalent of hearsay whether or not action was intended as an assertion) *with* FED. R. EVID. 801(a) & (c) (out-of-court action not hearsay unless "intended . . . as an assertion").

156. *See, e.g.*, M. FLEMING, *supra* note 67, at 44-53 (multiple appeals and review as a cause of almost "interminable" delay); *Burger Interview, supra* note 65, at 35 ("I suppose, when you talk about finality, that must carry with it a limit somewhere—that there is a point at which proceedings of all kinds are terminated. We haven't found that point in our system."); Pound, *supra* note 2, at 287-88; Rosenberg, *supra* note 6, at 1366.

157. *See* Burger, *For Whom The Bell Tolls*, in 36 VITAL SPEECHES OF THE DAY 322 (1970):

> In some of these multiple trial and appeal cases the accused continued his warfare with society for 8, 9, 10 years and more. In one case more than 60 jurors and alternates were involved in 5 trials, a dozen trial judges heard an array of motions and presided over these trials; more than 30 different lawyers participated either as court-appointed counsel or prosecutors and in all more than 50 appellate judges reviewed the case on appeals. I tried to calculate the costs for that one criminal case and the ultimate conviction. The best estimates could not be very accurate, but it added up to *a quarter of a million dollars.* The tragic aspect was the waste and futility since every lawyer, every judge and every juror was fully convinced of the defendant's guilt from the beginning to the end.

Id. (emphasis in the original). *See also* M. FLEMING, *supra* note 67, at 52.

right to appeal decisions, even in criminal cases.[158] However, it is generally agreed that a person convicted of a crime will be provided one appeal as of right.[159] The Supreme Court helped assure this result by guaranteeing indigent defendants appointed counsel to press their first appeal,[160] by requiring that indigents be provided transcripts if a written record is necessary for appeal,[161] and by requiring the waiver of fees that would otherwise bar the filing of an appeal.[162] These decisions are now so firmly rooted it is unlikely that appellate review in criminal matters will be directly curtailed. In contrast, the Court has recently endorsed rules that limit access to appeal in civil cases, reduce the scope of appeal in all cases, and diminish the availability of review beyond the first appeal as of right.

In *Ortwein v. Schwab*,[163] the Supreme Court approved significant procedural limitations on the right to appeal in civil cases. The State of Oregon required the payment of a $25 filing fee before any civil appeal could be initiated. Ortwein, an indigent recipient of public assistance, sought waiver of the fee in order to obtain review of an administrative hearing determination that had authorized the reduction of his public assistance. His request for waiver of the filing fee was denied by the Oregon courts. The United States Supreme Court, in a per curiam opinion, rejected Ortwein's claim that he should have been permitted to perfect his appeal without paying a fee. As the basis for its ruling the Court stated that "due process does not require a State to provide an appellate system."[164] The implication of this holding is that within certain limits,[165] the State is free, at least in civil cases, to curtail

158. *See, e.g.*, McKane v. Durston, 153 U.S. 684 (1894) (state is not required to provide any appellate process even in criminal cases).

159. The cases virtually assuring appellate review of criminal convictions are set forth in notes 160-62 *infra*. It is widely agreed that appeals are similarly available in the civil context. *See, e.g.*, Fuld, *The Gordian Knot: Congestion and Delay in Our Courts*, 39 N.Y. ST. B.J. 488, 490 (1967); Hufstedler, *Constitutional Revision and Appellate Court Decongestants*, 44 WASH. L. REV. 577, 590 (1969) ("the prevailing philosophy [is] that every litigant should have one appeal as a matter of right").

160. *See* Douglas v. California, 372 U.S. 353 (1963).

161. *See* Griffin v. Illinois, 351 U.S. 12 (1956).

162. *See* Burns v. Ohio, 360 U.S. 252 (1959).

163. 410 U.S. 656 (1973).

164. *Id.* at 660.

165. *See* 405 U.S. 56, 77 (1972) ("When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal

significantly the availability of appeals.

The scope of review on appeal in both criminal and civil cases has been progressively narrowed over the last seventy years. At about the turn of the century the standard for review of procedural and other errors at trial was quite strict, mandating reversal virtually whenever error was found.[166] Experience demonstrated that this strict standard was impractical because it resulted in reversals for plainly frivolous reasons.[167] To overcome this problem, the doctrine of harmless error was fashioned. This doctrine required the appellant to show that not only the rules regulating the adversary contest had been breached, but also that the breach had caused him an injury affecting his "substantial rights."[168] The harmless error rule has been steadily expanded by the Supreme Court with the net effect of drastically reducing procedurally premised reversals.[169] The rule has also been extended by judicial interpretation so that it encompasses issues other than procedure. Now, even a wide variety of constitutional errors may be treated as harmless.[170] The growth of the doctrine of harmless error has reduced the likelihood of success on appeal and undermined adversarial reliance on the appellate process as a means of assuring compliance with the

---

Protection Clause.").

166. *See* R. TRAYNOR, *supra* note 54, at 3-4 ("There was a time in the law, extending into our own century, when no error was lightly forgiven."); *The Harm of Harmless Error, supra* note 42, at 999-1005, n.46; Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 519 (1969) ("Under common law, prior to the enactment of the harmless error statutes, any error, regardless of its significance, resulted in an automatic reversal of the trial court's decision.") Pound, *supra* note 2, at 282.

167. *See* Kotteakos v. United States, 328 U.S. 750, 759-60 (1946); R. TRAYNOR, *supra* note 54, at 13; *The Harm of Harmless Error, supra* note 42, at 1005; Mause, *supra* note 166, at 519.

168. For a brief history of the federal harmless error rule *see* Kotteakos v. United States, 328 U.S. at 758-60. *See also* R. TRAYNOR, *supra* note 54, at 14; *The Harm of Harmless Error, supra* note 42, at 1005-07, 1006 nn.57 & 58. The federal rule presently appears at 29 U.S.C. § 2111 (1976) ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."). This statute is supplemented by procedural rules applicable in civil and criminal cases. See FED. R. CIV. P. 61; FED. R. CRIM. P. 52(a).

169. *See The Harm of Harmless Error, supra* note 42, at 1010 ("the federal statute has eliminated any tendency on the part of the federal appellate courts to reverse convictions because of technical errors").

170. *See The Harm of Harmless Error, supra* note 42, at 1012-18. For examples of the operation of the harmless error doctrine in the constitutional context, *see, e.g.*, Milton v. Wainright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

rules of procedure and evidence in the trial courts.[171]

In the case of *Ross v. Moffitt*,[172] the Supreme Court determined that indigent criminal defendants did not have a right to the appointment of counsel for the purpose of pursuing appeals beyond the first appeal as of right. The Court began its analysis by reciting the proposition that no appeal whatsoever was required by law to be provided to a losing party in either a civil or criminal case.[173] It next analyzed the function of court appointed attorneys on appeals in criminal cases and described them "as a sword to upset the prior determination of guilt."[174] While such a "sword" might be required to be equally available to all criminal defendants on a first appeal as of right, the Supreme Court concluded that beyond the first step, appeals did not have to be encouraged or their availability be made equal. In essence, the availability of discretionary appeals was held to be totally within the control of the legislatures and appellate courts, to be narrowed or prohibited as those bodies saw fit. While the holding in *Ross v. Moffitt* does no more than deny counsel to indigent defendants in discretionary appeals, its rationale seems to signal a retreat from the fundamental adversary concept of appellate review.

In all three of the areas in which appellate review has been curtailed, precious little discussion has been undertaken of the function of appeals in an adversary system. While the rhetoric of swift and certain justice did not figure largely in the decisions announced, the absence of other justification for the choices made would suggest once again the influence of arguments concerning speed and efficiency.[175]

---

171. *See The Harm of Harmless Error*, *supra* note 42:

> The impact of the error upon the defendant's case may be amplified by the fact that because the error may be held harmless few lawyers will themselves attempt to depend or advise clients to depend on the appellate court's setting the record straight. It is much more likely that trial strategy will change to accommodate rulings of the trial court, however erroneous.

Id. at 990; Mause, *supra* note 166, at 519-20.

172. 417 U.S. 600 (1974).

173. *Id.* at 606.

174. *Id.* at 611.

175. The primary motivation for any harmless error rule is the saving of time and judicial effort. *See* R. TRAYNOR, *supra* note 54, at 14 ("Their objective is to conserve not merely public funds, but the judicial process itself for legitimate disputes by guarding against needless reversals and new trials that would clog already burdened trial-court calendars."); Mause, *supra* note 166, at 543 ("judicial economy [is] the only real justification for a harm-

IV. The Need to Consider the Implications of the Rhetoric of Swift and Certain Justice

Critics have treated delay as a serious threat to the viability of the judicial process. Their earnestly advanced argument is that the courts, as presently constituted, are overtaxed and cannot continue to function in our society unless they are provided some sort of relief. It is argued that the only way to provide the requisite relief is to limit the time it takes to decide cases and limit the number of cases to be decided. Those aspects of the adversary process which cause delay are classified as expensive luxuries that cannot be afforded in a system fighting for its life.

The vigor with which these arguments have been pressed and their apparent influence suggest that the rhetoric of swift and certain justice poses a serious threat of undermining the adversary process as a whole. Almost every procedure in the adversary process moves at a measured pace rather than at maximum speed. Delay, or perhaps more accurately, deliberation, has been built into every aspect of the adversary system. If one adopts the view that delay is a danger so serious that virtually all other concerns bow before it, then each and every part of the adversary process is open to successful challenge.

Few commentators and judges who have utilized Pound's rhetoric or otherwise argued for an acceleration of the pace of judicial business have been willing to recognize that, implicitly, their criticisms damn the whole adversary framework. Delay is simply presented as an evil to be eradicated wherever found and however caused. No attention is devoted to the implications of the speedy justice argument or the consequence of undermining significant components of the adversary process. Nor have the critics of the adversary system chosen to defend the fast-moving, judge dominated, nonadversarial alternative they appear to advocate.

In case after case, the United States Supreme Court has sub-

---

less error rule"); Note, *Harmless Constitutional Error*, 20 Stan. L. Rev. 83, 83-84 (1967); Note, *Individualized Criminal Justice in the Supreme Court: A Study of Dispositional Decision Making*," 81 Harv. L. Rev. 1260, 1270 (1968).

The textual proposition is reinforced when it is noted that in *Ross v. Moffitt*, the states of North Carolina, Florida, Illinois, and Virginia, all based their argument against the extension of the right to counsel on the claim that the costs involved would be excessive. *See* Note, *Cost and Judicial Management Considerations in the Right to Counsel for Indigents' Discretionary Appeals—Ross v. Moffitt*, 24 De Paul L. Rev. 813, 824 n.64 (1975).

stantially curtailed adversary procedure without pausing to consider the impact of change on the justice system.[176] This is readily apparent in the decisions concerning plea bargaining, jury operation, and appellate procedure. Not one of the seminal opinions in these areas focuses on the value of the adversary process or the propriety of abandoning some aspect of it. Rather than engage in careful analysis, the Court has chosen to rely on the rhetoric of swift and certain justice,[177] dubious scientific studies,[178] or simplistic notions about the operation of mechanisms incorporated in the justice system.[179]

The quality of scholarly literature urging acceleration of the judicial process has not been much better. Roscoe Pound coined ringing phrases which have endured for seventy-five years. However, Dean Pound relied more on rhetoric than analysis in rejecting adversary process.[180] Similar shortcomings are manifest in the public statements of Chief Justice Burger. The Chief Justice's sharp attacks on delay and the procedures that allegedly cause it are never balanced with an analysis of the advantages of the present system or a discussion of the merits of a nonadversarial alternative. The sharpest criticisms of delay and the adversary system have been advanced by critics who ignore value questions fundamental to any serious consideration of change in the legal process. Such consideration is obviously essential in order to come to a

176. The Supreme Court has not been entirely consistent in promoting the cause of swift adjudication. Its treatment of the Sixth Amendment right to a speedy trial demonstrates a curious reluctance to secure celerity in the criminal process. *See* United States v. MacDonald, 435 U.S. 850 (1978); Barker v. Wingo, 407 U.S. 514 (1972); United States v. Marion, 404 U.S. 307 (1971); Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 538-39 (1975) ("The amendment has . . . been twisted totally out of shape—distorted from a guarantee that all accuseds will receive a speedy trial into a windfall benefit of criminal immunity for a very few accuseds in whose cases the pandemic failure of our courts to provide speedy trials has attained peculiarly outrageous proportions."); Rudstein, *The Right to a Speedy Trial: Barker v. Wingo in the Lower Courts*, 1975 U. ILL. L. REV. 11, 58; Uviller, *Barker v. Wingo: Speedy Trial Gets a Fast Shuffle*, 72 COLUM. L. REV. 1376, 1399-1400 (1972).

177. *See* notes 77-79 *supra*.

178. *See* note 122 *supra*.

179. *See* notes 121 & 174 *supra*.

180. For a criticism of the empirical underpinnings of Pound's 1906 speech, *see* Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in LAW IN A CHANGING AMERICA 56-74 (G. Hazard ed. 1968) ("The speech is thus a monument to a certain legal attitude. It has an aura of empiricism but displays literally no interest in finding out whether its topic as defined has any reality, or whether its diagnosis has any validity."). *Id.* at 60-61.

reasoned decision about how the justice system should be organized.[181]

No one can seriously object to the introduction of efficient techniques of judicial administration when those techniques do not reduce reliance on adversary methodology.[182] Even when reliance on adversary process is reduced, the result may be entirely acceptable if fundamental questions of values are considered and resolved. In *Hickman v. Taylor*,[183] the Supreme Court addressed the scope of the federal rules of discovery. Critics of these rules claimed, with some justification, that they could serve to discourage litigants from diligently preparing their cases for trial, and hence, seriously undermine the adversary system.[184] In its opinion, the Court carefully considered both the requirements of an adversary system[185] and the value of discovery as a modification of that system.[186] The Court then sought to fashion a compromise that would secure the benefits of discovery, while minimizing the threat discovery posed to the adversary process. Accordingly, the Court

---

181. *See* DELAY IN THE COURT, *supra* note 1, at 207; Rosenberg, *Court Congestion: Status, Causes, and Proposed Remedies*, in THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (H. Jones ed. 1965):

> Offsetting its paradoxical benefits for the administration of justice, the counterattack on trial delay has involved heavy costs—more than merely in money and effort. A serious debit has been the loss of a sense of proportion by many well-intentioned custodians of civil justice. Many of their cures for delay are much worse than the disease itself.
>
> . . . .
>
> In sum, among the costs of the obsession with speedier justice has been an erosion of the integrity of the judicial process from the viewpoint of the litigants and lawyers, some of whom have the impression that the courts regard their cases as merely counters in a numbers game. Slow justice is bad, but speedy injustice is not an admissible substitute. . . .

Id. at 57-58; Greene, *supra* note 76, at 248; Redish, *supra* note 28, at 508-09 n.92. *See also* Summers, *Evaluating and Improving Legal Processes—A Plea for 'Process Values'*, 60 CORNELL L. REV. 1, 38-44 (1974).

182. An example of such a technique is the pretrial conference as conducted in the State of New Jersey. Such conferences focus on the preparation of the case for trial and help to insure speedy and efficient litigation without compromising judicial neutrality or other fundamental adversarial values. *See* DELAY IN THE COURT, *supra* note 1, at 99; M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE 67-70 (1964); PROCEEDINGS, *supra* note 58, at 84-85 (remarks of then Judge William Brennan, Jr.).

183. 329 U.S. 495 (1947).

184. *See* J. FRANK, *supra* note 7, at 93; PRETRIAL DISCOVERY, *supra* note 7, at 12.

185. Hickman v. Taylor, 329 U.S. 495, 512-13. *See also* PRETRIAL DISCOVERY, *supra* note 7, at 124; C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 82 (2d ed. 1970).

186. Hickman v. Taylor, 329 U.S. 495, 500-01, 507.

created a qualified privilege insulating the "work product" of an attorney from discovery in most circumstances.[187] This qualified privilege reduced the danger that discovery could be used as means of capitalizing on an opponent's effort or be perceived as a reason to refrain from thoroughly preparing a case.[188]

The method utilized in *Hickman* to resolve a conflict between adversary and nonadversary objectives contrasts sharply with that employed in the recent Supreme Court decisions concering pleas, juries, and appeals. None of these decisions considered adversary values. None sought a compromise that might allow the accommodation of adversary and nonadversary concerns. *Hickman* demonstrates that such an approach can be successfully pursued. Because the adversary system vindicates values of real importance to American society, it is essential that such an effort be made and reliance on the rhetoric of swift and certain justice be eschewed.

V. Some Arguments in Defense of Adversary Process

While it is beyond the scope of this article to present a complete defense of the adversary process, some preliminary observations may be of use in helping to assess its worth. The adversary method provides litigants the means to control their lawsuits.[189] The parties play a significant part in choosing the forum, designating the proofs, and running the process. The courts, as a general matter, pursue the questions the parties propound. Ultimately, the whole procedure yields results tailored to the litigants' needs.

Party control of the adjudicatory process has a number of advantages. First, it tends to encourage desirable conduct on the part of the litigants and decision maker. Empirical data suggests that an advocate working in the adversarial context who finds his client at a factual disadvantage will expend significant effort to improve his client's position.[190] This is to be contrasted with the behavior of the advocate working in an inquisitorial setting who will seldom undertake an extensive search for better evidence to bolster a weak

187. *Id.* at 510.

188. *See* Pretrial Discovery, *supra* note 7, at 124; C. Wright, *supra* note 185; Note, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1028-29 (1961).

189. *See* Procedural Justice, *supra* note 7, at 22-23; *Efficient Procedure*, *supra* note 31, at 365. It should be noted that litigant control is not as extensive in the American criminal process as it is in civil litigation. *See* Goldstein, *supra* note 73.

190. Procedural Justice, *supra* note 7, at 38-39.

case.[191] The adversary process appears to encourage advocates to protect parties facing an initial disadvantage and hence improve the overall quality of the evidence upon which adjudication will be based.

Empirical data also suggests that adversarial emphasis on party presentation tends to counteract decisionmaker bias more effectively than does an approach requiring the active participation of the trier in marshaling the proof.[192] This finding provides tangible support for the theoretical assertion that the best decision maker is one whose *sole function* is adjudication.[193] Because adversary process assigns the prosecutorial function to the parties, it serves to increase the likelihood that the trier will be able to devote his full attention to a neutral adjudication of the case.

A second advantage that inheres in the adversary approach is that it tends to promote litigant and societal acceptance of the decisions rendered by the courts. Theorists maintain that when a party is intimately involved in the adjudicatory process and feels that he has been given a fair opportunity to air his case, he is more likely to accept the result whether favorable or not.[194] These same theorists further suggest that litigant control helps to establish the appearance of fairness, which is of crucial importance in persuading society of the legitimacy of judicial action.[195] There is little direct evidence concerning the extent of personal or societal acceptance of adversarial as opposed to other types of decisions. There is evidence, however, that a majority of people will designate adversary procedure the fairest sort of procedure for the resolution of disputes.[196] This finding lends support to the theory that the adversary process increases the likelihood of acceptance of decisions rendered.

A third advantage of the adversary process is that it tends to facilitate challenges to governmental action by aggrieved individuals. Because adversary judicial process allows litigants to define the issue to be resolved, it provides a forum to obtain consideration of

191. *Id.*
192. *Id.* at 49-51. *But see* Damaska, *supra* note 8, at 1095-1100.
193. *See* Fuller, *supra* note 7, at 34-35.
194. *See* PROCEDURAL JUSTICE, *supra* note 7, at 68; *Mobilization*, *supra* note 13, at 576.
195. *See* notes 16-18 *supra* & accompanying text.
196. PROCEDURAL JUSTICE, *supra* note 7, at 77-80, 94-96.

claims against the government.[197] The opportunity for a sympathetic hearing is likely to be increased because the judge and, to an even greater extent, the jury, are likely to be beyond the control of the government body being challenged. These propositions concerning the receptivity of adversarial courts to the claims of individual citizens are, at least in part, borne out by historical evidence. For a number of centuries adversary courts have served as a counterbalance to official tyranny and have worked to broaden the scope of individual rights.[198] When adversarial process has been ignored in the operation of the courts, as in the days of the Star Chamber, there has been an erosion of human rights and an increase in governmental repression.[199]

We live in an era of expanding government power. The urgency of social problems, including the scarcity of resources and the exigencies of national defense, tend to lead the government to exert pressure on the citizenry to cooperate in insuring the efficient operation of society as a whole. This pressure poses a keen threat to the maintenance of individual rights.[200] In these circumstances,

---

197. *See* Fiss, *The Supreme Court 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979):

> The judge is entitled to exercise power only after he has participated in a dialogue about the meaning of the public values. It is a dialogue with very special qualities: (a) Judges are not in control of their agenda, but are compelled to confront grievances or claims they would otherwise prefer to ignore. (b) Judges do not have full control over whom they must listen to. They are bound by rules requiring them to listen to a broad range of persons or spokesmen. (c) Judges are compelled to speak back, to respond to the grievance or the claim, and to assume individual responsibility for that response. (d) Judges must also justify their decisions.

Id. at 13.

198. *See* THE PARENCHYMA OF LAW, *supra* note 21, at 403-04 (The American lawyer "thinks it more than a coincidence that liberty has best thrived in the part of the world where procedure has been litigious and contentious rather than officious and inquisitorial."); Connolly, *supra* note 11, at 441; *Self Interest and Justice*, *supra* note 66, at 11 ("The role of the courts in fashioning and implementing human rights has been a momentous good, especially in recent decades."); Greene, *supra* note 76, at 248; Tribe, *Seven Pluralist Fallacies: In Defense of the Adversary Process—A Reply to Justice Rehnquist*, 33 U. MIAMI L. REV. 43, *passim* (1978). *But see* Korematsu v. United States, 323 U.S. 214 (1944) (judicial authorization of detention and relocation of citizens on the basis of ancestry); A. EHRENZWEIG, *supra* note 21, at 260-61 (" 'liberty has best thrived in this part of the world' *despite* rather than because of its vaunted 'litigious and contentious' procedures") (emphasis in the original).

199. *See* Watts v. Indiana, 338 U.S. 49, 54 (1949); Connolly, *supra* note 11, at 441-42; Goodhart, *supra* note 8, at 769-72.

200. The idea that rights are in essence claims that conflict with the interests or objec-

there is a need to preserve the kind of institution that will sympathetically review claims based on individual rights rather than governmental necessity or the common good. Because the adversarial courts are primarily committed to hearing and upholding the claims of the individuals, they are most likely to be capable of handling this task.

In response to these suggestions, it may be argued that an inquiring judge can as effectively protect individuals as can the neutral decision maker of the adversary system. Further, it may be said that the inquisitor can do this more efficiently and at smaller cost. While there is some truth to the proposition that inquisitorial process is efficient,[201] it is not, by its nature, committed to the vindiction of the rights of individuals; rather, its primary goal is the disclosure of material truth.[202] The adversary process is, by contrast, devoted in large measure, to the vindication of individual rights.[203] It should also be noted that an inquisitorial approach tends to depersonalize litigation by reducing the participation of the litigants.[204] For this reason, its efficacy in handling individualized claims can be questioned. Overall, the inquisitorial process is not as well suited to the protection of individual rights as is its adversarial counterpart, and therefore cannot be considered a satisfactory substitute.

VI. The Propriety of Using Nonadversarial Means to Resolve Disputes

The adversary method is not of equal utility in resolving all types of disputes. From the suggestions made in the preceding section, several situations can be identified in which the adversary process would seem particularly useful. The most outstanding of these is litigation involving a dispute between a citizen and the government. In such a dispute, whether it be a civil rights case, a

---

tives of government has been most thoughtfully explored in R. Dworkin, Taking Rights Seriously, *passim* (1978).

201. *See Small Claims Court, supra* note 9, at 597, 599.

202. *See* notes 19-21 *supra* & accompanying text; Connolly, *supra* note 11, at 441; *Small Claims Court, supra* note 9, at 596-97.

203. *See* R. Traynor, *supra* note 54, at 19; The Parenchyma of Law, *supra* note 21, at 412-13; The Trial of the Future, *supra* note 9, at 46-47; *Small Claims Court, supra* note 9, at 601; Connolly, *supra* note 11, at 441.

204. *See* Cappelletti, *supra* note 66, at 876-79.

criminal matter, or a contract action, the adversary judge and jury serve as a vital counterbalance to the power of the state.

On the other hand, there are a number of settings in which adversary procedure does not seem appropriate. When the parties must continue to work or live together in intimate contact or in a cooperative relationship, the adversary method may not be the best means of resolving their dispute.[205] Adversary procedure may exacerbate rather than resolve tensions and may not foster the kind of compromise essential to the restoration of harmony. For this reason, disputes like those between labor and management, or between family members in an intact family unit should usually be resolved in nonadversarial proceedings.

It is also sensible to utilize nonadversarial methods when *all the parties* strongly desire speed, simplicity, and economy in adjudication.[206] In such settings adversary process will tend to intrude undesired deliberation and expense. The labor grievance process provides an example of the type of case in which certain adversary procedures are avoided for reasons of economy and celerity.[207] Finally, where there is no dispute, adversary machinery is not needed. In situations like the uncontested divorce, adoption, or name change, there is little call for the panoply of procedures built into the adversary process.[208]

While it is possible to list types of cases that seem more or less suited to adversarial adjudication, any *a priori* designation threatens to unfairly exclude some litigants from access to procedures they view essential to the proper consideration of their cases. An arbitrary ban on adversarial consideration of "repetitious" cases,[209] or cases involving small sums of money,[210] or cases involving some

---

205. *See* C. CURTIS, *supra* note 11, at 3; J. FRANK, *supra* note 7, at 376-77; *Historical Perspective, supra* note 7, at 130 n.26; Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 120 (1976).

206. *See* PROCEDURAL JUSTICE, *supra* note 7, at 117; Sander, *supra* note 205.

207. *See* J. FRANK, *supra* note 7, at 377; Rosenberg, *supra* note 6, at 1360-61.

208. *See* PROCEDURAL JUSTICE, *supra* note 7, at 117; *A Tale of Two Courts, supra* note 66, at 270; Sander, *supra* note 205, at 119.

209. For an endorsement of such a ban, *see* Levi, *The Business of Courts: A Summary and a Sense of Perspective*, 70 F.R.D. 212, 216 (1976). *But see* Hufstedler, *supra* note 159, at 588-89.

210. For a comment qualifiedly supporting monetary limits, *see* Sander, *supra* note 205, at 124-25; *but see* Hazard, *supra* note 65, at 83. ("The principal difficulty of this approach is that the social and political significance of a legal issue may have, and often does have, no relation at all to the monetary or other intrinsic significance of the particular case in which

"institutional relationship"[211] raises serious problems of social and political judgment as well as accusations of unequal treatment. A better approach than categorical exclusion may be a system that allows the parties to choose the type of process best suited to their needs. Where all the parties make an *uncoerced* choice to avoid adversarial process it seems eminently sensible to honor their decision.[212] Use of an election mechanism may ease the burden on the adversarial courts, while protecting the rights of those who believe they cannot obtain redress outside the adversarial framework.

Only when the nature of the adversary process and the values it vindicates are clearly understood and considered is it possible to determine the extent nonadversary processes should be utilized by American courts to resolve disputes. If these issues are ignored, intelligent change is impossible. Arguments like that concerning swift and certain justice, which tend to obscure the fundamental issues, must be rejected as a basis upon which to premise change.

---

it arises."); Hufstedler, *supra* note 159, at 588-89.

211. Justice Rehnquist has proposed such a limit in Rehnquist, *The Adversary Society: Keynote Address of Third Annual Baron de Hirsch Meyer Lecture Series*, 33 U. MIAMI L. REV. 1, 2 (1978); *but see* Tribe, *supra* note 198, *passim*.

212. *See Efficient Procedure*, *supra* note 31, at 376.